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**District Hospital Partners, L.P. d/b/a The George Washington University Hospital, A Limited Partnership, and UHS of D.C., Inc., General Partner and 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region a/w Service Employees International Union.**  
Cases 05–CA–216482, 05–CA–230128, and 05–CA–238809

April 30, 2021

**DECISION AND ORDER**

BY CHAIRMAN MCFERRAN AND MEMBERS EMANUEL  
AND RING

<sup>1</sup> There are no exceptions to the judge’s finding that the Respondent did not violate Sec. 8(a)(1) by telling employees, when it announced a new transit benefit, that “[p]reviously the union did not negotiate this benefit on your behalf so you did not receive it.” There are also no exceptions to the judge’s finding that the Respondent’s “bargaining briefs”—summaries of the state of negotiations from the Respondent’s point of view—were lawful, and even if there were, those communications were protected under Sec. 8(c). Thus, unlike our colleague, we do not rely on them in assessing the lawfulness of the Respondent’s initial bargaining proposals.

The dissent takes the position that the 8(c)-protected status of the bargaining briefs does not preclude considering them as evidence of “the Hospital’s motivation.” Yes, it does. Evidence of “the Hospital’s motivation” would be relevant to whether the Respondent bargained with a purpose to frustrate agreement—i.e., whether it bargained in bad faith. But statements protected under Sec. 8(c) cannot be used as evidence of an unfair labor practice. 29 U.S.C. § 158(c).

The cases the dissent relies on are distinguishable in two respects. First, the statements at issue in those cases were not found protected under Sec. 8(c). Second, those cases involved employers whose communications to employees reinforced an unlawful “take-it-or-leave-it” approach to collective bargaining, which the Respondent did not employ.

In *American Meat Packing Corp.*, 301 NLRB 835 (1991), at the outset of negotiations for a successor contract, the employer proffered a series of proposals, the most significant of which sought extensive changes in job classifications and wage rates. Three days later, the employer’s president, Herrmann, announced to employees that the proposal on job classifications and wage rates “[would] go into effect on December 20, 1985,” the day after the current contract expired. Id. at 836. And in subsequent letters to employees, Herrmann “pictured the union negotiators as people with no legitimate role to play other than agree to the Respondent’s proposals.” Id. at 839. Meanwhile, in collective bargaining, it was starkly apparent that the employer had entered negotiations with a predetermined resolve not to budge from its initial proposals. Based on this “take-it-or-leave-it” stance, plus additional unlawful conduct, including direct dealing, unilateral implementation of the job classifications proposal, and a threat of plant closure, the Board found that the statement to employees 3 days into negotiations further evidenced the employer’s “hostility to the bargaining process,” id. at 836, and that the totality of the evidence, including the employer’s communications to employees, “manifested an intent to undermine employee support for the [u]nion and enable [the employer] to impose, virtually unchanged, what it unilaterally decided at the outset was a fair set of terms and conditions

On September 4, 2019, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions<sup>1</sup> and briefs and has decided to affirm the judge’s rulings,<sup>2</sup> findings,<sup>3</sup> and conclusions only to the extent consistent with this Decision and Order.

The principal issue in this case is whether the Respondent failed and refused to bargain in good faith with 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region (the Union) in violation of Section 8(a)(5) and (1) of the Act solely

of employment.” Id. Notably, the Board rejected the judge’s reasoning that the employer’s bargaining proposals alone constituted bad-faith bargaining. Id. at 835.

In *General Electric Co.*, 150 NLRB 192 (1964), enf’d. 418 F.2d 736 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970), the Board relied in part on a statement the employer made to employees, by means of which it “consciously placed itself in a position where it could not give unfettered consideration to the merits of any proposals the [u]nion might offer.” Id. at 196. Before bargaining commenced, the employer told employees that it would make “a fair and ‘firm’ offer that would include ‘everything’ shown by its total research to be in the common best interests of employees, shareowners, and others concerned with the success of its business.” Id. at 216. Then, in negotiations, it told the union that “everything we think we should do is in the proposal and we told our employees that, and we would look ridiculous if we changed now.” Id. at 196.

Here, unlike the employers in *American Meat Packing* or *General Electric*, the Respondent never refused to consider union proposals, did not adopt a take-it-or-leave-it posture, and did not use statements it made to employees as leverage in negotiations. And the General Counsel never contended otherwise: the only issue in this case is whether the Respondent’s proposals alone demonstrated bad-faith bargaining. Moreover, as discussed in more detail below, after presenting its initial proposals to the Union, the Respondent demonstrated a willingness at the bargaining table to move from its starting positions, unlike the employers in the cases the dissent cites.

<sup>2</sup> The Respondent has excepted to the judge’s ruling at the hearing to permit the General Counsel to amend the Amended Complaint to allege that the Respondent violated Sec. 8(a)(1) when, during its trial preparation, it interviewed employees without first adequately advising them of their rights under *Johnnie’s Poultry Co.*, 146 NLRB 770 (1964), enf’d. denied 344 F.2d 617 (8th Cir. 1965). The Respondent asserted that Sec. 10(b) barred the allegation because it was not closely related to any of the timely-filed unfair labor practice charges against it. Although the judge granted the General Counsel’s request to amend, he found that the Respondent’s interviews did not violate Sec. 8(a)(1). No party excepted to the judge’s dismissal of the allegation. Accordingly, we find it unnecessary to pass on the Respondent’s exception because it is moot.

<sup>3</sup> The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf’d. 188 F.2d 362 (3d Cir. 1951).

because of the bargaining proposals it presented to the Union during the course of the parties' negotiations for a successor collective-bargaining agreement (CBA). The judge found that the Respondent's bargaining proposals evidenced unlawful surface bargaining.<sup>4</sup> For the reasons discussed below, we disagree with the judge. We find that, although the Respondent clearly engaged in hard bargaining, the General Counsel failed to show that the Respondent's proposals in and of themselves demonstrated bad-faith bargaining. All other excepted-to findings depend on the surface-bargaining finding; reversing the judge's decision as to the latter, we necessarily reverse as to the former. Accordingly, we dismiss the complaint in its entirety.

### Facts

The judge's decision goes into far more detail concerning what transpired at the parties' collective-bargaining meetings than we will attempt here. What follows are the more salient facts.

For more than 20 years, the Union represented a bargaining unit of around 150 full- and part-time employees of the Respondent who worked in the Environmental Services, Linen Services, Ambulatory Care Center, and Food Services Departments of the George Washington University Hospital in Washington, D.C. The parties' most recent CBA expired on December 19, 2016. In anticipation of the CBA expiring, on November 21 and 22, 2016, the parties held their first negotiation sessions. The parties discussed bargaining schedules, "housekeeping" items, and several contract provisions. Wanting to rectify what it viewed as numerous deficiencies in the current CBA, the Respondent mentioned upfront that it would seek to substantially alter many of the contract provisions to make them less antiquated and ambiguous. Specifically, the Respondent told the Union that it sought "a contract that is clear [] to the managers that will utilize it" and explained

that "a lot of what we have is out of date and antiquated. We want to streamline and [make it] as modern as possible."<sup>5</sup>

### The Respondent's Initial Management Rights Proposal

On December 6, 2016, at the parties' next bargaining session, the Respondent tendered its initial Management Rights proposal. In its proposal, the Respondent sought to reserve for itself the right to act unilaterally with respect to a number of important managerial prerogatives.<sup>6</sup> Because it was also proposing to nullify all past practices, the Respondent explained that it wanted a comprehensive Management Rights clause that captured all of the rights it had already been exercising under the soon-to-expire CBA.

At the parties' fourth negotiation session, on December 7, 2016, the Union was represented by new counsel, Stephen Godoff. Although the Union addressed a few of the Respondent's proposals at this session,<sup>7</sup> its new representative used his initial appearance at the negotiations to level accusations and question motives. He accused the Respondent of creating a difficult negotiating atmosphere and called the Respondent's proposals "disturbing." He questioned the Respondent's "intentions," i.e., whether the Respondent was interested in reaching a new agreement, even though it was only the fourth bargaining session, and only 2 weeks had elapsed since the negotiations had commenced. He described one of the Respondent's proposals as "a nothing burger" and another as "an absolute waste of everyone's time." As the judge succinctly put it, "Godoff started off with a bang." His performance at this session was not atypical, however. In later sessions, he told the Respondent's representatives to "kiss my ass" and to "get the fuck out of here," among other profanities. And later in December 2016, instead of countering the Respondent's initial proposal, the Union opted to threaten

We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

<sup>4</sup> The judge also found that the Respondent's alleged bad-faith bargaining caused a majority of the unit employees to sign a disaffection petition, and hence he concluded that the Respondent could not rely on the petition to withdraw recognition from the Union. Based on that finding, the judge found that the Respondent violated Sec. 8(a)(5) and (1) by withdrawing recognition from, and refusing to bargain with, the Union and by subsequently implementing unilateral changes to the unit employees' terms and conditions of employment.

<sup>5</sup> Our colleague asserts that the Respondent's "modernizing" proposals "amounted to eliminating crucial guarantees and protections" for employees and the Union. Without accepting her characterization of the potential impact of the Respondent's initial proposals if ultimately

agreed to by the parties, we note that the Respondent presented them as its *initial* proposals. The Respondent expressed its willingness to modify those proposals as part of the back-and-forth process of collective bargaining, and it did modify its proposals. For its part, however, the Union mostly declined to participate in the process, resorting to vituperation and curt rejections of the Respondent's proposals rather than seeking to move negotiations forward by offering its own counterproposals.

<sup>6</sup> This included, among other things, the right to (1) allow supervisors to perform bargaining unit work; (2) use contractors and subcontractors to perform bargaining unit work; (3) search unit employees; (4) discipline employees without cause; (5) change benefit plan carriers, insurers, administrators, fiduciaries, and/or trustees; (6) determine the existence, number, and type of positions to be filled by employees; (7) determine the extent to which bargaining unit work could be performed at the facility.

<sup>7</sup> As the judge found, by the end of the December 7 bargaining session the Union had rejected one of the Respondent's proposals and tendered counteroffers regarding three others.

that the Respondent “will wind up being at war. War with SEIU.”<sup>8</sup>

#### The Respondent’s Initial Discipline Proposal; Progress on Management Rights

On January 17, 2017,<sup>9</sup> the Respondent submitted its initial Discipline proposal to the Union.<sup>10</sup> At that negotiation session, the Union continued to make profane and denigrating comments about the Respondent’s proposals while failing to offer written counterproposals. For instance, the Union’s representative referred to one of the Respondent’s proposals as “[g]ratuitous bullshit and nastiness I have no interest in[,] disgusting,” and he responded to a concern raised by the Respondent with the retort, “[m]anagement flexibility my ass.”

At the January 31 negotiation session, the parties discussed the Respondent’s initial Discipline proposal. The Union proposed changes, and the Respondent showed flexibility in response, agreeing to provide written notification to employees of certain discipline, to pay discharged employees by a stated deadline, to refrain from disciplining employees in a manner that would embarrass them before other employees or the public, and to strike catchall provisions regarding conduct exempt from progressive discipline. On February 1, the Union responded to the Respondent’s initial Management Rights proposal, agreeing to much of it. At negotiation sessions on February 22 and 23, the parties further discussed the Respondent’s initial Discipline proposal, and the Respondent made significant concessions in response to concerns raised by the Union, including reducing the length of time that discipline would remain active in employees’ files.<sup>11</sup> On

March 28, the Respondent presented a revised Management Rights proposal, which addressed a concern raised by the Union. Upset that the Respondent did not make more substantive concessions, the Union responded to the revised Management Rights proposal by telling the Respondent to “[g]et the fuck out of here.” The Union made no counterproposal.

#### The Respondent’s Initial No Strikes and No Lockouts, Grievance and Mediation, and Union Security and Dues Checkoff Proposals

On March 29, the Respondent presented its initial proposals on a number of additional subjects. The Respondent tendered its initial No Strikes and No Lockouts proposal, under which employees would be prohibited from picketing and using other economic weapons in response to violations of the CBA or federal law. The Union did not counter this proposal because it did not perceive it as “serious,” but it expressed the concern that the proposal would postpone an employee pay raise. At the same negotiation session, the Respondent presented its initial Grievance and Mediation and Union Security and Dues Checkoff proposals.<sup>12</sup> In response to the Grievance and Mediation proposal, Godoff remarked, “This is potentially goodbye to this session. We won’t have time to read through this today.” Before the parties had a chance to discuss the Respondent’s initial Union Security and Dues Checkoff proposals, the Union told the Respondent, “This is bullshit,” “We’re out of here,” and “Kiss my ass. We’ll let you know where we are going from here.”

On April 5, the parties discussed the Respondent’s initial Grievance and Mediation proposal, particularly some

<sup>8</sup> Although the Union threatened “war” with the Respondent, there is no evidence that it seriously considered holding a strike vote or providing the required strike notification to the Federal Mediation and Conciliation Service (FMCS). So also, the Union expressed “concern,” as early as March 29, 2017, that negotiations would be prolonged and would delay a wage increase for the unit employees. It reiterated its concern over that delay on June 12, 2017, and colorfully and heatedly complained at various times about the pace of negotiations—and yet it did little to push negotiations to a conclusion, allowing month after month to pass without presenting counteroffers to the Respondent’s proposals.

The Union’s conduct appeared to acknowledge, implicitly, that the Respondent had superior bargaining leverage, which only increased the longer negotiations continued. The unit employees had not received a wage increase since January 2016, and it was to be expected that they would lose patience with the Union—helped along in this regard by the Respondent’s bargaining briefs—as time went by without a successor agreement. Notably, there is no allegation in this case that the status quo required the Respondent to increase wages. The dissent implies as much, claiming that the Respondent “withheld” a wage increase “to sow disillusionment among employees.” But the Union never filed such a charge, which it presumably would have done if the facts allowed. Our colleague’s insinuation to the contrary notwithstanding, the Union evidently recognized that the Respondent’s duty was to maintain the status quo while bargaining continued, including keeping wages frozen until the

parties either concluded a successor agreement or reached overall impasse. See *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enfd.* mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). In other words, time was on the Respondent’s side.

<sup>9</sup> All dates hereinafter are in 2017 unless otherwise indicated.

<sup>10</sup> The Respondent sought, among other things, to delete just-cause language, remove any discipline short of discharge from arbitration, place limits on union representation at investigatory interviews, and only apply progressive discipline “where appropriate.”

<sup>11</sup> Our colleague faults the Respondent for meeting no more than two sessions a month, while ignoring the fact that it was the Union that declined to have full-day bargaining sessions.

<sup>12</sup> The Grievance and Mediation proposal would have granted the Union the right to file grievances over certain contractual disputes that it could ultimately submit to non-binding mediation using the services of the FMCS. It also would have permitted an employee to pursue a claim in court for breach of any contractual provision subject to mediation. The Union Security proposal sought to delete the union security provision in the expired CBA in its entirety. The Dues Checkoff proposal sought to eliminate a requirement that, when remitting dues deductions, the Respondent provide the Union a report containing unit employees’ contact and work information and to eliminate employee authorization to have their contributions to the 1199SEIU Political Action Fund deducted.

discrepancies between it and the Respondent's Discipline proposal. The Respondent also explained several reasons for its March 29 Union Security proposal, including employee complaints about dues obligations. The Union pointed out that the Respondent had negotiated a CBA in Boston that contained a union security clause. The Respondent replied that the CBA in Boston, including the union security clause, was the "result of back and forth" with the union in Boston. Godoff said, "We'll give you our answer now. No." At that same negotiation session, with respect to proposed changes to the safety clause in the expired CBA, the Union asked, rhetorically, "Do you guys give a shit? It's a disgusting proposal" and exclaimed, "You just don't give a goddamn about these workers." When the Respondent suggested the Union devote more time to countering instead of critiquing, the Union replied, "Here's the counter—no."

On April 6, the Union continued to refuse to negotiate over the Respondent's initial Union Security proposal and instead presented a written counterproposal that summarily stated, "REJECT." Also, at that same negotiation session, despite acknowledging that the wage structure in the expired CBA had created significant problems, the Union proposed a 5 percent across-the-board pay raise. At the May 16 negotiation session, the Respondent stated that it would be tendering a proposal related to employees' hours. Godoff replied, "I'm going to tell you we're not going to accept [new noneconomic] proposals at this point. You can send it to us but, no, we are not going to agree."

#### The Respondent's Revised Discipline Proposal; Wage Discussions

At the May 25 negotiation session, to resolve a discrepancy the Union had highlighted between the Respondent's Discipline proposal and its Grievance and Mediation proposal, the Respondent amended the former so that it was not inconsistent with the latter.<sup>13</sup> At the June 12 negotiation session, the Union accused the Respondent of causing the negotiations to drag out and noted that employees had been working for months without a pay increase. Nonetheless, at the July 31 negotiation session, the Union insisted that it would not agree to a CBA that did not include "just cause" for discipline and binding arbitration.

On October 6, the parties continued to discuss problems with the wage structure in the expired CBA,<sup>14</sup> and toward the end of the session the Respondent asked whether the discussion would lead the Union to move from its wage proposal, which maintained the existing wage structure and called for an across-the-board increase. The Respondent also remarked that "it shouldn't surprise anyone that we're going to propose a new [wage] str[u]cture." The Union conceded that "it's a terribly unfair system." The Respondent agreed that the parties owed it to future employees and managers "to be clear and make it easier to figure out."

The parties held additional negotiation sessions on January 17, 2018 and February 13, 2018. Godoff was absent from these sessions for medical reasons. On March 12, 2018, the Union filed an unfair labor practice charge against the Respondent alleging that its bargaining proposals constituted surface bargaining.

#### The Respondent's Initial Wage Proposal

At the parties' May 18, 2018 bargaining session—the first session after the Union filed its unfair labor practice charge—the Respondent made its initial Wage proposal. Under the Respondent's proposal, employees would receive a market-based adjustment and merit-wage increases based on performance evaluations.<sup>15</sup> The Respondent also proposed pay ranges for each classification, and employees' placement within the applicable pay range would be based on their years of experience. According to the Respondent, the transition to pay ranges, which would happen when the CBA was ratified, would result in an immediate wage increase. The Respondent also proposed awarding employees nondiscretionary lump-sum bonuses and shift differential pay.<sup>16</sup>

On May 21, 2018, the parties met for another bargaining session. Despite recognizing problems with the current wage structure, which its proposal for an across-the-board increase retained, the Union objected to the Respondent's proposal on several grounds, including that the proposed merit-wage increase would not go into effect until August 2019 when, as the Union observed, the employees had not received a raise since January 2016.<sup>17</sup> The Respondent replied that the employees would receive a significant wage increase as soon as a new CBA was ratified, but it also noted that the delay in employees receiving a wage

<sup>13</sup> The judge erroneously stated that the Respondent never reconciled the discrepancy.

<sup>14</sup> Relatedly, the parties discussed a lingering wage-underpayment issue. Godoff testified that the Respondent ultimately made the affected employees whole, with interest, after extensive discussion with the Union over the amount of backpay due.

<sup>15</sup> The proposal specified that the market-based adjustment would not reduce pay rates of current unit employees.

<sup>16</sup> Notwithstanding our colleague's suggestion, the nondiscretionary components of the Respondent's initial Wage proposal and placement of employees within pay ranges based on their years of experience demonstrate that the Respondent's proposal did not give it unfettered discretion over employees' compensation.

<sup>17</sup> The judge incorrectly quoted Godoff as stating that employees had not received a raise since January 2015.

increase was “an unfortunate side effect to bargaining.” The Respondent also invited the Union to counter its proposal.<sup>18</sup>

#### The Respondent’s Revised No Strikes and No Lockouts and Wage Proposals

On June 7, 2018, after further negotiations about its No Strikes and No Lockouts proposal, the Respondent made a significant concession and withdrew the proposal. On July 31, 2018, the Union rejected outright the merit component of the Respondent’s Wage proposal, stating that “merit is not anything the [U]nion is looking to do.” At the conclusion of the session, the Respondent noted that the Union had failed to counter 15 of its proposals while the Respondent had responded to all but 2 of the Union’s proposals. Godoff’s explanation was that the Respondent had moved away from the expired CBA. (Again, the Respondent had announced at the very start of the negotiations that it would seek to substantially alter many provisions of the expired CBA.) At the negotiation session the next day, the Respondent modified its Wage proposal to provide that every employee would receive, at minimum, a 2 percent wage increase at the time a successor CBA was ratified. The Respondent also offered to work with the Union to ensure the accuracy of its calculations as to employees’ years of experience to determine the correct placement of each employee within the applicable pay range. The Union never made a written counter to the Respondent’s Wage proposal.

#### The Union’s Counterproposals on Union Security, Management Rights, and Grievance Procedure

On September 5, 2018, the Union presented counterproposals on union security, management rights, and grievance procedure—more than 18 months after the Respondent presented its proposals on union security and grievances (March 29, 2017) and its revised proposal on management rights (March 28, 2017). The union security proposal contained the same language as the union security provision in the Boston CBA that the Union had referenced at the April 5, 2017 negotiation session. The management-rights and grievance procedure proposals were taken from CBAs between the Union and hospitals in New York. They were substantially different from the comparable provisions in the parties’ expired CBA and unresponsive to the Respondent’s initial proposals. In particular, the Union’s management-rights proposal effectively

rescinded the Union’s previous acceptance of numerous subsections in the Respondent’s December 6, 2016 management-rights proposal. The Union acknowledged that its counterproposals needed revision. Nonetheless, the Respondent discussed the Union’s counterproposals and expressed its continued willingness to negotiate.

The parties held their last negotiation sessions on October 10 and 11, 2018. The parties continued to discuss numerous noneconomic issues, including management rights, discipline, dispute resolution, and union security. The Respondent also noted that the Union had yet to respond to its revised Wage proposal. Despite reaching tentative agreements on several provisions at three of their last four negotiation sessions, the parties were unable to reach a complete agreement. However, the Respondent repeatedly expressed its willingness to bargain, asked the Union to offer further counterproposals, and reminded the Union of the status of the pending proposals that it had previously made to the Union.

#### Employee Disaffection Petition; Respondent’s Withdrawal of Recognition

On October 25, 2018, the Respondent received a petition signed by a majority of employees in the bargaining unit. The following morning, the Respondent emailed the Union that it had “received objective evidence which clearly and unequivocally indicates that the Union has lost the support of a majority of bargaining unit employees” and that it was “withdrawing recognition of the Union effective immediately.” Accordingly, the Respondent also cancelled all future bargaining sessions.

On November 1, 2018, the Respondent distributed a memorandum to the unit employees about “the new pay rates and benefits you will now have as a non-union employee.” The Respondent informed the employees that many of them would receive significant wage increases—at least 3 percent—and would also be eligible for a merit increase based on their performance evaluation, as well as a new lump-sum bonus program. In addition, the Respondent notified the employees that it would be “transitioning everyone to [its] non-union benefit programs including PTO, Holidays, and Leave Banks,” that a monthly commuter subsidy would be automatically added to their paychecks, and that they would have the opportunity to participate in new employee engagement activities. The Respondent unilaterally implemented the wage increases in November and December 2018.

<sup>18</sup> Thus, the judge’s and the dissent’s suggestion that the Respondent refused to bargain over its Wage proposal is incorrect. In addition, as the judge noted, the Union conceded at the October 10, 2018 bargaining session that it had failed to respond to the Respondent’s Wage proposal, blaming its failure to do so on the time spent on noneconomic issues. It cannot be “take it or leave it”—as our colleague posits—when one party

simply fails to test the other party’s willingness to move from its proposal. Moreover, as noted below, the Respondent *did* move from its initial Wage proposal—after the Union complained that employees had not received a raise since January 2016—modifying it to provide a minimum 2 percent increase for every unit employee at contract ratification.

### Analysis

Section 8(d) of the Act requires parties engaged in collective bargaining “to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.” When determining whether an employer has violated its statutory duty to bargain in good faith, the Board must ultimately determine, under the totality of the circumstances, “whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.” *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 8 (2018) (quoting *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487 (2001), enf’d. 318 F.3d 1173 (10th Cir. 2003)); see also *Audio Visual Services Group, Inc. d/b/a PSAV Presentation Services*, 367 NLRB No. 103, slip op. at 6–7 (2019) (finding that the parties engaged in lawful hard bargaining by holding firm to their positions because “neither party was required to give up its position or make concessions”), aff’d. sub nom. *International Alliance of Theatrical Stage Employees, Local 15 v. NLRB*, 957 F.3d 1006 (9th Cir. 2020).

Where an employer is alleged to have violated its good-faith bargaining obligation on the basis of its bargaining proposals, the Board will not decide whether specific proposals are “acceptable” or “unacceptable,” but it will “consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract.” *Reichhold Chemicals*, 288 NLRB 69, 69 (1988), enf’d. in relevant part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991). However, this does not deny a party the right to “stand firm on a position

if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree.” *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984); see also *Phillips 66*, 369 NLRB No. 13, slip op. at 5 (2020) (finding that the parties engaged in hard but lawful bargaining as they stood firm on their respective core positions, while the employer also showed its willingness to adjust its proposals and reach agreement on other issues).

Moreover, the Board will not find that an employer failed to bargain in good faith if the union assumes that the employer’s initial proposals reflect unalterable positions without testing the employer’s willingness to engage in the give and take of collective bargaining. See *Audio Visual Services Group*, above, slip op. at 8 (“[W]e find that the [u]nion did not sufficiently test the [r]espondent’s willingness to bargain prior to filing its bad-faith bargaining charge.”); *Captain’s Table*, 289 NLRB 22, 23 (1988) (“Nor do we find that when negotiations ended prematurely through the default of both parties . . . the [u]nion had sufficiently tested the [r]espondent’s proposals to permit us to assess the latter’s willingness to bargain in good faith.”).<sup>19</sup>

The General Counsel alleged, and the judge found, that the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining based solely on the following four bargaining proposals that the Respondent presented to the Union during the course of the parties’ 2 years of negotiations: 1) its Grievance and Mediation proposal in tandem with its No Strikes and No Lockouts and Management Rights proposals; 2) its revision to its Discipline proposal to make disputes over discharges no longer subject to binding arbitration; 3) its Union Security proposal deleting the union security provision in the parties’ expired CBA; and 4) its Wage proposal, which purportedly gave

<sup>19</sup> The dissent cites *Wright Motors, Inc.*, 237 NLRB 570 (1978), enf’d. in relevant part 603 F.2d 604 (7th Cir. 1979), for the proposition that when an employer’s initial bargaining proposals are unreasonable, the union need not test the employer’s willingness to bargain over them. *Wright Motors* is not comparable to the instant case. For example, under the Respondent’s initial No Strikes and No Lockouts proposal, employees would be prohibited from picketing and resorting to other economic weapons in response to violations of the collective-bargaining agreement or federal law. In *Wright Motors*, the employer’s initial no-strike proposal, among other things, would have (a) required the union to fine any employee who engaged in a work interruption, (b) granted the employer the right to seek an injunction and file suit for damages against the union without arbitrating the claimed violation, (c) made the union, its officers, agents, and members individually and collectively liable for damages, (d) required the union to waive its legal right to remove a suit filed by the employer from a state or federal court, and (e) required the posting of a \$20,000 bond to be forfeited as liquidated damages in the event of a violation of the article. Id. at 571–572. The differences between that case and this are stark, and *Wright Motors* does not excuse the Union’s failure to test the Respondent’s willingness to bargain.

The conduct of the employer in *Hydrotherm, Inc.*, cited by our colleague, is also markedly different from how the Respondent approached its negotiations with the Union. In *Hydrotherm*, prior to the first negotiation session, the union presented a package of proposals. 302 NLRB 990, 990 (1991). In response, the employer presented only one proposal at the first negotiation session, which vested it with exclusive authority over numerous subjects. Id. At the second session, the employer presented a proposal that was silent on several important issues and failed to counter any of the union’s economic proposals, instead insisting on a “take-it-or-leave-it” approach to merit wage increases. Id. at 990–991. Over the five remaining negotiation sessions, the employer either failed to present proposals or did so on only a few subjects without addressing important outstanding issues, including management rights, temporary employees, grievance and arbitration, or the treatment of discharge and discipline. Id. at 991–992. By the last negotiation session, the employer insisted on unilaterally implementing merit raises and told the union that it saw no reason for further meetings. Id. at 992. Here, unlike the employer in *Hydrotherm*, the Respondent, over the course of 30 negotiation sessions, was consistently responsive in offering its own bargaining proposals and responding to the Union’s.

the Respondent unfettered discretion over employees' pay. For the reasons that follow, we reverse the judge's finding that the Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) by tendering these proposals to the Union.

<sup>20</sup> The Supreme Court has held that proposing and bargaining for a management-rights clause is not a per se violation of the duty to bargain in good faith, *NLRB v. American National Insurance Co.*, 343 U.S. 395, 407–409 (1952), and the Board has found broad management-rights proposals consistent with fidelity to that duty. In *Rescar, Inc.*, the Board found that proposals for broad management-rights and no-strike clauses with a limited grievance and arbitration procedure did not evince a disposition not to reach an agreement with the union. 274 NLRB 1, 2 (1985). Our colleague notes that the Board in *Rescar* relied on the fact that the employer did not maintain these proposals as a package, but the same is true here. The Respondent did not insist on the Union considering its proposals as all-or-nothing. Rather, it advanced its proposals as entry points for discussions, it repeatedly invited the Union to offer counterproposals, it never refused to entertain counters on the rare occasions the Union offered them, and it ultimately withdrew its no-strike proposal. Under these circumstances, that the initial proposals were aggressive does not support an inference that the Respondent was seeking to frustrate the possibility of reaching an agreement. See *Artiste Permanent Wave Co.*, 172 NLRB 1922, 1924 (1968) (Even assuming the respondent's proposals "can be called 'outlandish,' inflated or extreme . . . , it is well settled that [r]espondent had the right to submit them for consideration without penalty under the Act, provided it did not continue an adamant insistence on them in arbitrary fashion as a condition of any agreement, without offering reasons or justification for its position, or without displaying any willingness to discuss their terms, make concessions, or compromise on their terms and scope."). And while the dissent sharply criticizes the Respondent's proposals, she does not mention the inconvenient fact that the Union initially *accepted* most of the Respondent's proposed management-rights clause.

Likewise, the Respondent's other bargaining proposals were lawful in and of themselves. First, the record does not support the judge's finding that the Respondent "essentially concede[d]" that its no-strike proposal was unlawful. The Respondent merely exercised its right to withdraw a proposal that the Union had objected to in the hopes of furthering the bargaining process. Cf. *Reichhold Chemicals*, 288 NLRB at 70 (the employer's narrowing of its initial no-strike proposal in response to the union's concerns supported a finding of no bad faith).

Second, the Respondent's proposal to change the existing wage structure does not evidence an intent to frustrate agreement. The Union itself acknowledged that the existing structure was a "terribly unfair system," and yet its only wage proposal would have retained it. Moreover, as the Board recognized in *McClatchy Newspapers*—the holding of which the judge and the dissent mischaracterize—an employer may lawfully "attempt[] to negotiate to agreement on retaining discretion over wage increases." 321 NLRB 1386, 1391 (1996), *enfd.* in relevant part 131 F.3d 1026 (D.C. Cir. 1997), *cert. denied* 524 U.S. 937 (1998); see also *Woodland Clinic*, 331 NLRB 735, 740 (2000) ("[A] merit wage increase proposal that confers on an employer broad discretionary powers is a mandatory subject of bargaining on which parties may lawfully bargain to impasse.") (citing *McClatchy*). Our colleague analogizes the Respondent's Wage proposal to the unlawful wage proposal in *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850 (1982), *enfd.* 732 F.2d 872 (11th Cir. 1984), *cert. denied* 469 U.S. 1035 (1984). But that comparison fails. In *A-1 King Size Sandwiches*, the employer steadfastly refused to deviate from its 24-year practice of granting completely discretionary wage increases solely on the basis of merit and never offered to bargain with the union over non-merit-based wage increase factors, such as seniority. Id.

Although the Board examines the totality of the circumstances and not the propriety of individual proposals in making surface-bargaining determinations, we note initially that not one of the Respondent's proposals was unlawful in and of itself.<sup>20</sup> Moreover, although the

at 857–859. Here, the Respondent not only expressed its willingness to bargain over its Wage proposal, it also revised the proposal to provide a minimum 2 percent wage increase for all employees at the time a successor CBA was ratified. By its own admission, the Union never countered the Respondent's revised proposal. Moreover, unlike the wage proposal in *A-1 King Size Sandwiches*, the Respondent's Wage proposal included non-discretionary components—lump-sum bonuses, shift differential pay, and reliance on years of experience in placing employees within pay ranges—so it did not seek unlimited managerial discretion over employees' wages.

The record does not support the dissent's suggestion that the Union's failure to counter the revised Wage proposal was due to a refusal on the Respondent's part to tell the Union where unit members would be placed on the pay scales until October 11, 2018. Rather, the record shows that at the August 1, 2018 bargaining session, the Respondent offered to work with the Union to determine the correct placement of each employee within the applicable pay range. Besides, the Union itself blamed its failure to respond to the Wage proposal on the time spent on noneconomic issues.

Third, assuming without deciding that philosophical opposition is an insufficient basis for opposing union security, the Respondent's Union Security proposal was not based exclusively on philosophical grounds. Although the judge failed to mention this, the Respondent explained that it had received complaints from its employees about the union security clause—a fact the Union acknowledged—and that union security also impeded its recruitment efforts. Cf. *Phelps Dodge Specialty Copper Products*, 337 NLRB 455, 455 fn. 1 (2002) (finding that employer did not bargain in bad faith with regard to union security where, in relevant part, "some bargaining unit members informed management that they objected to joining the [u]nion"). Also, as noted above, the Respondent expressed its willingness to engage in "back and forth" over union security, which the Union failed to test. See *AMF Bowling Co.*, 314 NLRB 969, 974 (1994) (reversing the judge's bad-faith finding where the General Counsel failed to show that the respondent was unwilling to discuss its union security proposal with the union), *enfd.* in relevant part 63 F.3d 1293 (4th Cir. 1995). With respect to dues checkoff, the Respondent's initial proposal was not to eliminate but only to modify certain aspects of the dues-checkoff article in the expired contract, in particular language pertaining to remittance report information and checkoff of political action committee contributions. The Respondent stood ready to negotiate over the issue.

Fourth, although the judge found that the Respondent regressed from its Discipline proposal when it modified the proposal to subject discharges to mediation rather than arbitration, "[t]he fact that proposals are regressive or unacceptable to the union, or that the union finds the employer's explanations for them unpersuasive, does not suffice to make proposals unlawful if they are not 'so harsh, vindictive, or otherwise unreasonable as to warrant a conclusion they were proffered in bad faith.'" *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 4 (2018) (quoting *Genstar Stone Products Co.*, 317 NLRB 1293, 1293 (1995)). The Respondent's explanation for its change to its Discipline proposal was not unreasonable; it was made to remove a mistaken discrepancy between that proposal and its Grievance and Mediation proposal—a discrepancy the Union pointed out. And there was no tentative agreement on the Discipline proposal at that time. We see no reason for questioning the Respondent's stated motive for revising its Discipline proposal to ensure consistency across its proposals.

Respondent's initial combination of proposals sought substantial concessions from the Union, a party does not violate its duty to bargain in good faith by testing its bargaining leverage in this way. As it turned out, the Respondent did have substantial leverage due to fact that the unit employees had not received a wage increase for some time. The Union was well aware of the situation, as demonstrated by its repeated expressions of concern over that prolonged delay. Notwithstanding its concern, however, the Union itself contributed to the very delay about which it complained. Negotiations dragged on for many months without counterproposals from the Union on numerous issues. To the extent the Respondent adhered to its proposals on these issues, it was not being intransigent; it merely refrained from bargaining against itself. Moreover, the Union initially accepted most of the Respondent's proposed management-rights clause. And when it subsequently regressed on that issue in its counterproposal on management rights, and also when it presented its counterproposal on grievances, the Union immediately admitted that its proposals needed to be revised. Importantly, the Respondent never insisted on any of its proposals—either alone or in combination—to impasse or presented them as part of a last, best, and final offer. Compare *Altura Communication Solutions, LLC*, 369 NLRB No. 85 (2020) (finding that the employer failed to bargain in good faith based in part on the proposals contained in its final offer); *Public Service Co. of Oklahoma (PSO)*, 334 NLRB at 488–489 (same).<sup>21</sup>

In fact, nothing in the record indicates that the Respondent was unwilling to bargain over its proposals. For instance, the Respondent never refused to continue bargaining over its combined Management Rights, No Strikes and No Lockouts, and Grievance and Mediation proposals, and it eventually withdrew its No Strikes and No Lockouts proposal—a significant concession. The Respondent made other concessions as well. For instance, at the January 31, 2017 negotiation session, the Respondent relented on some changes sought by the Union to the Respondent's Discipline proposal, agreeing to provide written notification to employees of certain discipline, to set a

deadline by which discharged employees must be paid, to refrain from disciplining employees in a manner that would embarrass them before other employees or the public, and to strike catchall provisions regarding conduct exempt from progressive discipline. The Respondent made further concessions on discipline the following month, including reducing the length of time that discipline would remain active in employees' files. The Respondent's modification of its proposals in response to the Union's counters was not the behavior of a party seeking to frustrate the possibility of reaching an agreement.

At the same time, the Union repeatedly declined to test the Respondent's willingness to bargain over its proposals. As an example, at the April 5, 2017 negotiation session, when the Union presented a union security proposal lifted from a CBA with a Boston hospital, the Respondent observed that the Boston CBA was the “result of back and forth” in negotiations and invited the Union to offer a counterproposal and engage in a comparable “back and forth.” The Union refused to do so and the next day summarily rejected the Respondent's initial Union Security proposal. On management rights, the Union initially agreed to many of the subsections in the Respondent's initial proposal, but then regressed 18 months later by presenting a counterproposal that completely disregarded the Respondent's proposal and repudiated its prior tentative agreement.

Based on its conduct in negotiations, the Union seems to have decided early on that the Respondent had no interest in reaching an agreement. It said as much, just 2 weeks into collective bargaining. Perhaps the Union decided that its best chance of prevailing lay in Board litigation rather than at the negotiating table. It filed a surface bargaining charge on March 12, 2018, without having attempted to test the Respondent's willingness to bargain in good faith on a range of issues. Indeed, several months later, on July 31, 2018, the Respondent pointed out that the Union had yet to offer counterproposals to 15 of the Respondent's proposals, while the Respondent had countered all but two of the Union's. By way of explanation, the Union replied that the Respondent had moved away from the expired

<sup>21</sup> In support of her view that the Respondent bargained in bad faith, our colleague relies heavily on the Board's recent decision in *Altura Communication*, but that case is readily distinguished. In *Altura Communication*, the employer presented the union with a last, best, and final offer that would have given the employer unilateral control, during the term of the contract, over almost all terms and conditions of employment. The offer included a two-tier wage proposal that set minimums but otherwise gave the employer complete discretion to increase, and substantial discretion to decrease, individual employees' wages. It also included a proposal to transfer almost all contractual employee benefits to an extra-contractual handbook, the terms of which were exclusively controlled by the employer. In addition, the no-strike clause in the final offer would have precluded any and all protests, regardless of the reason. The

employer also insisted that the union submit written proposals as a condition of further bargaining and then refused to meet even after the union responded with comprehensive written proposals, and it declared impasse and implemented some of the terms of its final offer despite the fact that the union's proposals significantly narrowed the differences between the parties' positions. In contrast, the Respondent in this case never presented wage and benefit proposals like those in *Altura*, never refused to meet and bargain (until it received evidence that the Union had lost majority status), never suggested that its proposals were a final offer or claimed that bargaining was at an impasse, and never proposed as broad a no-strike clause as that in *Altura*—and the no-strike clause the Respondent did propose it later rescinded.



CBA. But at that time, the parties had been in collective bargaining for more than 18 months, and the Respondent made clear at the outset of negotiations that it *intended* to bargain for a contract that “moved away” from the expired CBA. Instead of seriously attempting to reach an agreement by substantively engaging with the Respondent’s proposals, the Union chose to be intransigent and belligerent, repeatedly uttering profane and offensive comments.<sup>22</sup>

The Respondent, for its part, considered the counterproposals put forward by the Union, demonstrated its willingness to move from its positions on more than one occasion, and withdrew its No Strikes and No Lockouts proposal entirely. To be sure, the Respondent also stood firm on a number of positions that differed substantially from terms contained in the expired CBA, and this was a sea change in the parties’ bargaining relationship. As Section 8(d) makes clear, however, the Respondent’s unwillingness to

make concessions on these matters was not inconsistent with the duty to bargain in good faith. Moreover, the record contains no evidence of conduct away from the bargaining table that tends to support an inference of bad-faith bargaining.<sup>23</sup>

Contrary to the dissent, it is not bad-faith bargaining to begin negotiations by presenting “a ‘wish list,’ ‘throw-in-the-kitchen-sink’ kind of proposal that one frequently sees in a party’s first proposal.” *Target Rock*, 324 NLRB at 385. It is not bad-faith bargaining to advance a specific proposal that would leave the union with fewer rights than it would have without a contract, since every management-rights proposal does exactly that, and management-rights proposals are lawful under Supreme Court precedent dating back nearly 70 years. See *NLRB v. American National Insurance Co.*, 343 U.S. at 407–409. It is not bad-faith bargaining for an employer to decline to bargain against itself when its negotiating partner fails to test its

<sup>22</sup> Our colleague contends that the Union’s oral counterproposals were sufficient to communicate its position. The problem with the Union’s counterproposals was not that they were oral. It was that they lacked detail and only reiterated the Union’s insistence that the Respondent just roll over and agree to language from the expired contract without modification. The dissent also faults us for noticing the way Godoff behaved at the bargaining table and essentially accuses us of being the politeness police. To be clear, we could care less about Godoff’s penchant for profanity. What matters is what the Union did *not* say. Godoff said “no” and “REJECT,” dismissed proposals as “bullshit” and “nothing burgers,” and generally gave the Respondent’s proposals the back of his hand *instead* of seriously engaging with the Respondent’s initial proposals to try to find common ground. This left the Respondent to choose between standing firm and bargaining against itself, and it is not bad-faith bargaining to decline to do the latter.

<sup>23</sup> The dissent conflates cases in which an employer engaged in conduct designed to impede the bargaining process both at the bargaining table and away from it with this case, in which the Respondent is alleged to have engaged in bad-faith bargaining based solely on its initial bargaining proposals. For instance, in *Radisson Plaza Minneapolis*, quoted by our colleague, the Board stated that the employer’s “dealings with the [u]nion both at the bargaining table and away from it were clearly calculated to impede bargaining and weaken the [u]nion with a view to having it removed as the employees’ collective-bargaining representative, rather than to reach agreement.” 307 NLRB 94, 94 (1992) (internal footnote omitted), *enfd.* 987 F.2d 1376 (8th Cir. 1993). In *Radisson Plaza Minneapolis*, the employer insisted on a perpetual reopener clause that would permit the employer to alter or discontinue any benefits or other policies contained in the agreement, and it pressed proposals regarding the union-ratification vote and to require annual proof of the union’s majority support. *Id.* at 95–96. The employer also rebuffed the union’s request to discuss certain changes to employees’ job assignments, unilaterally implemented wage increases, stalled in responding to the union’s request for basic information about the unit employees, and briefly reneged at the outset on its voluntary recognition of the union—while its chief negotiator wasted time by indulging in long-winded discourses on irrelevant topics. *Id.*

In *Target Rock Corp.*, also cited by the dissent, the finding of bad-faith bargaining was driven as much by the timing of the employer’s proposals as by their substance. Five months after the commencement of negotiations, and on the same day of a union meeting to vote on whether

to continue or end a strike that the union was clearly losing, the employer proposed terms that sparked outrage among the strikers and that would “have left the [u]nion members better off without the [u]nion and without a contract,” including an unlawful “yellow dog” provision that would prohibit employees from joining the union during their first year of employment. 324 NLRB 373, 384–387 (1997), *enfd.* 172 F.3d 921 (D.C. Cir. 1998). The Board adopted the judge’s reasonable conclusion that the employer’s aim was not to reach an agreement but rather to prolong the strike. *Id.* at 373, 387. Significantly, the Board in *Target Rock* also adopted the judge’s distinguishing of cases in which employers were found *not* to have bargained in bad faith where they advanced restrictive proposals early in the negotiations. *Id.* at 386–387. The judge in *Target Rock* referred to such a lawful proposal as “a ‘wish list,’ ‘throw-in-the-kitchen-sink’ kind of proposal that one frequently sees in a party’s first proposal.” *Id.* at 385 (emphasis added). That pretty well describes the Respondent’s initial proposal. Fairly read, then, *Target Rock* supports our position, not the dissent’s.

In *Prentice-Hall, Inc.*, cited by the dissent, the Board found that the totality of the evidence indicated that the employer never intended to reach an agreement because the evidence showed that the employer counted on the passage of the certification year without any real prospect of a contract causing sufficient employee dissatisfaction to enable it to eventually withdraw recognition. 290 NLRB 646, 646 (1988). The Board’s inference of bad-faith bargaining in that case was strengthened by the employer’s tactic of pretending to concede on a particular matter objected to by the union only to reincorporate its original proposal in another clause. *Id.* In this case, the Respondent never employed such deceptiveness in its negotiations with the Union by saying one thing and doing another. To the contrary, it was always forthright with the Union and expressed its willingness to seriously entertain the Union’s concerns and proposals.

Finally, in *San Isabel Electric Services, Inc.*, also cited by our colleague, the Board found that the employer engaged in bad-faith bargaining by refusing even to discuss safety and work rules with the union—a crucially important issue, given the dangers faced by employees who work on power lines—and its insistence on its management-rights proposal was a smokescreen to conceal an effort to exclude the union from having any involvement in establishing safety and work rules. 225 NLRB 1073, 1080 (1976). Here, in contrast, the Respondent never refused to discuss any mandatory subject of bargaining.

willingness to modify its positions by offering counterproposals. *Audio Visual Services Group*, above, slip op. at 8. And it is not bad-faith bargaining to stand firm on proposals that are even predictably onerous to a union where, as here, the employer “reasonably believes . . . that [it] has sufficient bargaining strength to force the other party to agree.” *Atlanta Hilton & Tower*, 271 NLRB at 1603.

The Respondent met with the Union for 30 bargaining sessions, made many of its initial proposals at the outset of the negotiations, solicited counterproposals from the Union, made concessions in response to the Union’s bargaining positions, and never refused to bargain over any mandatory bargaining subject—and all the while it calmly answered the Union’s bellicose conduct by continuing to bargain. Ultimately, because of the Respondent’s active participation in the bargaining process, the General Counsel could only fault the Respondent for the substance of its proposals. However, the Board does not sit in judgment of a party’s bargaining proposals. And the Respondent’s initial proposals did not evince an intent to frustrate the reaching of an agreement when they were not presented as final offers, and the Respondent always remained willing to move from its position. Accordingly, in considering the totality of the Respondent’s conduct, including its bargaining proposals, we find that the General Counsel did not establish that the Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1).

Because the Respondent did not engage in surface bargaining during the negotiations, we also reverse the judge and find that the Respondent did not violate Section 8(a)(5) and (1) when it withdrew recognition from, and refused to bargain with, the Union after receiving objective evidence that the Union had, in fact, lost the support of a majority of the unit employees, and when it subsequently implemented unilateral changes to the unit employees’ terms and conditions of employment.<sup>24</sup>

#### ORDER

The complaint is dismissed.

Dated, Washington, D.C. April 30, 2021

<sup>24</sup> We find that the Respondent properly relied on the disaffection petition signed by a majority of the unit employees in withdrawing recognition from the Union. In doing so, we do not rely on the employees’ testimony regarding their subjective reasons for signing the disaffection petition, which was considered by the judge. See *Johnson Controls, Inc.*, 368 NLRB No. 20, slip op. at 12 & fn. 56 (2019).

<sup>1</sup> *Altura Communication Solutions, LLC*, 369 NLRB No. 85, slip op. at 1 (2020), quoting *Phillips 66*, 369 NLRB No. 13, slip op. at 4 (2020).

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William J. Emanuel, Member

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John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MCFERRAN, dissenting.

As the Board has recently pointed out, the “‘essence of bad-faith bargaining is a purpose to frustrate the possibility of arriving at any agreement,’” and sometimes that bad purpose is revealed by the content of an employer’s bargaining proposals, considered in the “‘totality of [the] employer’s conduct” both at and away from the bargaining table.<sup>1</sup> This is clearly such a case, although my colleagues do not see it that way.

For more than 20 years, the Union represented about 150 employees at the Hospital, the respondent here. During that time, the parties’ collective-bargaining relationship was, by all accounts, harmonious. Employees enjoyed the fruits of a collective-bargaining agreement that provided them with workplace rights and benefits that are typical of a union contract: compensation with fixed annual wage increases and benefits established by the contract, the ability to grieve and arbitrate disputes, a just-cause standard for discipline, job security, and the protection of unit work. All that changed when the contract expired in 2016, and the Hospital decided to chart a different course—a course designed to frustrate reaching an agreement and, it seems, to oust the Union altogether.<sup>2</sup>

At the start of the bargaining over a successor contract and for the nearly 2 years that followed, the Hospital withheld employees’ annual wage increases and, as part of a campaign against the Union, used the withheld wage increases to sow disillusionment among employees. All the while, the Hospital’s bargaining position—reflected in a package of proposals—was that it would only accept the unconditional surrender of employees’ contractual and statutory rights. When the Union, unsurprisingly, refused to capitulate, the Hospital exploited employees’ disillusionment with the delay to withdraw recognition from the Union.

<sup>2</sup> Under the Board’s contract-bar doctrine, a collective-bargaining agreement insulates a union from challenge for up to three years, creating an incentive for antiunion employers *not* to reach agreement, apart from the desire to avoid creating contractual obligations to employees. See generally *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996) (discussing contract-bar doctrine).

As Board precedent illustrates, the Hospital's conduct here amounted to a textbook case of bad-faith bargaining. The majority, however, essentially faults the Union and its lead negotiator for the outcome here. The majority's painfully detailed discussion of the union bargaining representative's intemperate language suggests that the tone of the union counsel's communications is somehow relevant to the reasonableness of the *employer's* bargaining proposals. It is not. The Board's job here is to apply our law on surface bargaining, not give out points for politeness.

In my view, the record reveals not only the Hospital's bad purpose, but also the Union's recognition of what was unfolding and its understandable, if unpleasant, anger. Frustrating agreement makes for frustrated negotiators. For the reasons that follow, the Board should adopt (not reverse) the administrative law judge's conclusion that the Hospital bargained in bad faith.<sup>3</sup>

### I.

There is basic agreement on the legal principles that govern this case, as well as on the essential facts here. We differ, and differ sharply, on how to apply the law to the facts presented. A recent unanimous Board decision finding bad-faith bargaining, *Altura Communication*, supra, should guide us today. Explaining the principles of the duty to bargain in good faith created by Section 8(d) of the National Labor Relations Act, the *Altura* Board observed that although employers and unions are entitled "to bargain hard for a contract each side perceives as desirable," and the Board does not "sit in judgment of the substantive terms of bargaining," it is the Board's "role . . . to oversee the process to ascertain that the parties are making a sincere effort to reach agreement," and so the Board "will examine [bargaining] proposals and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective bargaining contract."<sup>4</sup> The Board's "examination of the [employer]'s proposals

is undertaken to determine, not their merits, but 'whether in combination and by the manner proposed they evidence an intent not to reach agreement.'"<sup>5</sup>

In *Altura*, the Board examined employer proposals that would have given the employer substantial discretion to raise or lower employees' wages, complete discretion over work hours, and the ability to alter or eliminate employee benefits.<sup>6</sup> The employer also proposed a broad management-rights clause, coupled with a broad no-strike clause and a grievance procedure that would have excluded many discretionary employer actions from coverage—including elimination of the bargaining-unit altogether.<sup>7</sup> Drawing on extensive Board and judicial precedent stretching back to the 1970's, the *Altura* Board concluded that "[c]onsidered in their entirety, the [employer]'s proposals would have required the [u]nion 'to cede substantially all of its representational function, and would have so damaged the [u]nion's ability to function as the employees' bargaining representative that the [employer] could not seriously have expected meaningful collective bargaining.'"<sup>8</sup>

*Altura Communication* is only the most recent in a line of Board cases involving what by now is a familiar employer strategy to avoid reaching a collective-bargaining agreement and to undermine an incumbent union. This case illustrates the same, unlawful employer approach, but here, the majority allows the employer to get away with it. That is more than just unfortunate for the Union. As the Board has observed, the "fundamental rights guaranteed employees by the Act—to act in concert, to organize, and to freely choose a bargaining agent—are meaningless if their employer can make a mockery of the duty to bargain by adhering to proposals, which clearly demonstrate an intent not to reach an agreement with the employees' selected collective-bargaining representative."<sup>9</sup>

<sup>3</sup> I would also affirm the judge's conclusion that the Hospital's withdrawal of recognition was unlawful, because an employer may not lawfully withdraw recognition from a union where it has committed unfair labor practices that are likely to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996), aff'd. in relevant part and remanded 117 F.3d 1454 (D.C. Cir. 1997). In turn, the Hospital's unilateral changes to employees' terms and conditions of employment, made after the unlawful withdrawal of recognition, were also unlawful. *Flying Foods*, 345 NLRB 101, 104 (2005) enfd. 471 F.3d 178 (D.C. Cir. 2006).

<sup>4</sup> *Altura Communication*, supra, 369 NLRB No. 85, slip op. at 1 (internal quotation marks and citations omitted). As the Supreme Court has observed, "there is tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 486 (1960).

<sup>5</sup> *Altura Communication*, supra, 369 NLRB No. 85, slip op. at 4, quoting *Coastal Electric Cooperative*, 311 NLRB 1126, 1127 (1993).

<sup>6</sup> *Id.* at 4–5.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.* at 6, quoting *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 489 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003). Among the decisions cited by the *Altura* Board are *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98 (2018); *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992) enfd. 987 F.2d 1376 (8th Cir. 1993); *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850 (1982), enfd. 732 F.2d 872 (11th Cir. 1984); *Eastern Maine Medical Center*, 253 NLRB 224 (1980), enfd. 658 F.2d 1 (1st Cir. 1981); and *San Isabel Electric Services, Inc.*, 225 NLRB 1073 (1976).

<sup>9</sup> *Reichhold Chemicals, Inc.*, 288 NLRB 69, 70 (1988), enfd. in part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991).

## II.

The administrative law judge's opinion comprehensively describes the parties' bargaining and the Hospital's actions. A brief review of the key facts is helpful. For more than 20 years, the Hospital and the Union had successive collective-bargaining agreements. The most recent agreement expired in December 2016. Bargaining for a new contract began in November 2016 and lasted nearly *two years*, until October 2018. From the beginning, the Hospital made no secret of its aim to make radical changes. The Hospital called this effort "modernizing" the agreement. It amounted to eliminating crucial guarantees and protections for employees, stripping the Union of its function, and giving the Hospital free rein to determine employment terms and conditions. In short, a traditional contract, and a traditional role for the Union, were to be treated as things of the past. The most significant changes that the Hospital proposed were:

- an expansive management-rights clause that (among other things) gave the Hospital the right to unilaterally reassign bargaining unit work, to discipline employees without cause, and to change employees' health insurance and benefits at any time;<sup>10</sup>
- a dispute resolution proposal that replaced arbitration with non-binding mediation;
- a sweeping no-strike provision prohibiting employee picketing and use of economic weapons in response to violations of the collective-bargaining agreement or federal law;
- the elimination of check-off for union dues and the union security clause;<sup>11</sup> and

- a wage proposal that placed employees on hospital-wide pay scales where the Hospital had the unfettered discretion to determine wage increases.

With only some small modifications, the Hospital never budged from these proposals.

There was another important component to the Hospital's strategy: withhold employee wage increases and publicly blame the Union. Under the expired contract, employees had received annual wage increases, the last in January 2016. Once the contract expired, employees would not receive another increase until October 2018 – after the Hospital withdrew recognition from the Union. Throughout the bargaining process, the Hospital required supervisors to read and distribute bargaining briefs to employees at pre-shift meetings. The administrative law judge found that the "bargaining briefs continually disparaged the Union during bargaining, misrepresented the parties' bargaining positions, including its wage proposals, ... blamed the Union for the lack of a pay raise," and "served to undercut unit employees' support for the Union."<sup>12</sup>

As to wages, the Hospital consistently maintained that it would not bargain over economics until all non-economic proposals were resolved, which, according to the Union, involved Hospital proposals to alter 19 out of 20 non-economic provisions in the contract. Instead, at the Hospital's insistence, the focus remained on its demands for significant concessions. The Hospital finally made its wage proposal in May 2018, over a year and a half into bargaining -- and more than a year after the Union had submitted a wage proposal. The wage-structure in the Hospital's proposal was unprecedented for the parties. Bargaining-unit employees would be placed on hospital-wide wage scales, at the Hospital's discretion, with the same wage rates for union and non-union employees. Any

<sup>10</sup> Under the management-rights proposal, the Hospital reserved the right to: (1) assign any amount of bargaining-unit work to supervisors; (2) use contractors and contract personnel to perform bargaining-unit work; (3) engage in searches of unit employees without limit; (4) discipline employees without cause; (5) change employees' health insurance and other benefits at any time; (6) determine what positions were part of the unit; (7) determine the existence of bargaining-unit work; and (8) determine the extent to which bargaining-unit work could be performed at all. The Hospital also proposed a "zipper" clause nullifying all past practices and reaffirming the Hospital's right, without limitation, "to make, change and enforce rules, regulations and policies governing employment and conduct of employees on the job."

With respect to discipline, the Hospital's proposal departed from longstanding contract language by: (1) eliminating the requirement that employees be disciplined for "just cause;" (2) excluding any discipline short of discharge from "the full grievance and arbitration procedure;" (3) placing limits on employees' right to union representation at investigatory interviews; and (4) weakening the progressive discipline system.

<sup>11</sup> The Hospital contemporaneously stated that the proposal reflected its belief "that employees should have a choice as to whether or not to

pay union dues, and should not be fired, as the union is insisting, if they choose not to pay dues."

<sup>12</sup> My colleagues, citing the judge's finding that the Hospital's bargaining briefs were lawful under Sec. 8(c) of the Act, refuse to consider them in assessing whether the Hospital bargained in good faith. But if, for instance, we want to understand why the Hospital opposed a union security clause, looking at the totality of the circumstances, we can surely look to the bargaining briefs that communicate the Hospital's motivation without running afoul of Sec. 8(c). This is consistent with the long-standing principle that simply because conduct is not unlawful does not mean the Board is "precluded from considering such conduct, in the totality of circumstances, as evidence of the actual state of mind of the actor." *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 506, (1960) (Frankfurter, J., concurring). See also *American Meat Packing Co.*, 301 NLRB 835, 839 (1991) (ad hominem attacks and attempts to denigrate the union in the eyes of the employees support an inference of bad-faith bargaining); *General Electric*, 150 NLRB 192, 274 (1964) enf'd. *NLRB v. General Electric*, 418 F.2d 736, 757 (2nd Cir. 1969) (employer's bargaining briefs publishing its take-it-or-leave-it bargaining proposals support a finding of bad-faith bargaining).

wage increases during the contract term would be discretionary, based on the Hospital's evaluations of employees. The Hospital informed the Union that its wage proposal was non-negotiable.<sup>13</sup>

Repeatedly during the course of negotiations, the Union's lead, Stephan Godoff, expressed his frustration with the pace of bargaining and the substance of the Hospital's proposals. As early as February and March 2017, Godoff and his fellow bargaining team members complained that the Hospital was slow-walking the negotiations. Of particular concern, the Hospital refused to agree to more than two sessions a month. At the same time, the Union and Godoff were growing increasingly alarmed by the dramatic—and often unexplained—concessions being demanded by the Hospital. To be sure, Godoff did not hold back in expressing himself. At various points during the negotiations Godoff characterized the Hospital's proposals as “disgusting,” “bull shit,” “nastiness,” and a “disgrace,” and made clear that he had no interest in discussing such unacceptable proposals. As observed by the administrative law judge, however, Godoff was not alone in making such colorful comments. Indeed, there were raised voices and interruptions all around the table throughout the parties' contentious negotiations.

In March 2018, the Union set this case in motion by filing an unfair labor practice charge against the Hospital, alleging that it was bargaining in bad faith by “maintaining a restrictive grievance/arbitration provision and no strike provision, while at the same time an expansive management rights clause in its contract proposal.” At this point, the Hospital had maintained its combination of proposals a full year. (It would do so until June 2018, when it finally withdrew its proposed no-strike provision.)

About the time that the Union filed its charge with the Board, a bargaining-unit employee began circulating a petition expressing disaffection from the Union. In October 25, 2018, the employee submitted the petition to the Hospital's chief executive officer. The administrative law judge found that “[m]ost [employees] who signed the petition did so because they were disappointed with the

Union's inability to get a new contract and the resulting wage increases.”

The next day, after determining that 81 out of 156 bargaining-unit employees had signed the petition, the Hospital withdrew recognition from the Union, revoked the Union's access rights, and stopped bargaining. A 20-year bargaining relationship was terminated. On November 1, 2018, the Hospital told employees that it was “delighted to welcome [them] to the GW Hospital team of non-union employees” and that the Hospital was making across-the-board changes to working conditions—including granting significant pay increases. There was nothing unforeseeable about this result, and nothing surprising about the Hospital's expressed delight.<sup>14</sup>

### III.

Examined in light of Board precedent, the record evidence is more than enough to establish, as the administrative law judge found, that the Hospital engaged in bad-faith bargaining. The Hospital's demonstrated purpose was, in the words of the *Altura Communication* Board, “to frustrate the possibility of arriving at any agreement.” That purpose is reflected in the combination of bargaining proposals that the Hospital made and adhered to, even apart from its campaign to undermine the Union. Following an approach by now familiar to the Board, the Hospital's “dealings with the Union . . . were clearly calculated to impede bargaining and weaken the Union with a view to having it removed as the employees' collective-bargaining representative, rather than to reach agreement.”<sup>15</sup>

#### A.

To begin, as *Altura Communication* illustrates, the Board has long held, with court approval, that employer proposals which, taken as a whole, would leave employees with fewer rights than they would have *without* a contract are clearly designed to frustrate the collective-bargaining process.<sup>16</sup> The most prominent example is when an employer simultaneously insists on a broad management-rights clause, a no-strike provision, and no effective grievance-and-arbitration procedure.<sup>17</sup> This would require

<sup>13</sup> The Union countered with a proposal guaranteeing certain wage increases where employees at least met expectations, but the Hospital did not agree.

<sup>14</sup> As the Supreme Court has observed, employers are presumed to intend the foreseeable consequences of the actions, under the National Labor Relations Act as in other areas of the law. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963), citing *Radio Officers' Union of Commercial Telegraphers Union v. National Labor Relations Board*, 347 U.S. 17, 45 (1954).

<sup>15</sup> *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992), enf'd. 987 F.2d 1376 (8th Cir. 1993).

<sup>16</sup> When no collective-bargaining agreement is in place, an employer remains subject to the duty to bargain established by Sec. 8(d) of the Act. The employer may not change any term and condition of employment

without first giving the union notice and opportunity to bargain. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991). Employees, in turn, retain all of the Sec. 7 rights that might be given up in an agreement, including the right to strike. *Id.* at 199.

<sup>17</sup> See e.g., *Target Rock*, 324 NLRB 373, 386 (1997) (“An employer acts in bad faith when, during negotiations, it simultaneously insists on a broad management-rights clause, a no strike provision, and no effective grievance-and-arbitration procedure.”), citing *San Isabel Electric Services*, 225 NLRB 1073, 1079 fn. 7 (1976) (“We have consistently found bad-faith bargaining in cases in which an employer has insisted on a broad management rights clause and a no-strike clause during negotiations, while, at the same time, refusing to agree to an effective grievance and arbitration procedure.”) (collecting cases). My colleagues claim it was the timing rather than the substance of the proposals in *Target Rock*

employees to sacrifice their statutory right to strike, while offering few, if any, contractual guarantees in return. The employer would be free to change many terms and conditions of employment unilaterally, and there would be no simple way to enforce what rights the contract did give employees.

Here—in making a radical, so-called “modernizing” break with prior agreements—the Hospital advanced and adhered to precisely the combination of proposals that the Board has consistently condemned. As discussed, the Hospital pursued a management-rights clause that would have allowed the Hospital to alter, eliminate, or subcontract unit work and to alter health insurance and other benefits during the term of the contract.<sup>18</sup> Similarly, it proposed to retain unfettered discretion to determine any wage increases and sought the unlimited power to “make, change and enforce rules, regulations and policies governing employment and conduct of employees on the job.” The Hospital also pursued a no-strike provision that required employees to give up their statutory rights to engage in picketing and to use economic weapons, such as a strike, in response not only to violations of the collective-

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that was unlawful. But that is at odds with the decision itself, which states that the employer’s position exceeded the bounds of lawful hard bargaining because they proposals would “have left the Union members better off without the Union and without a contract.” 324 NLRB at 386. That is precisely what the judge found in this case.

The majority’s observation that an employer is free to engage in hard bargaining, and may lawfully seek a management-rights clause, has no application here. Management-rights clauses that give the employer “unilateral control over virtually all significant terms and conditions of employment” are examples of bad-faith bargaining. *Altura Communication Solutions*, supra, 369 NLRB No. 85, slip op. at 3–4, quoting *Public Service Co. of Oklahoma* (PSO), 334 NLRB 487, 487 (2001), enf. 318 F.3d 1173 (10th Cir. 2003).

The majority cites *Rescar, Inc.*, 274 NLRB 1, 2 (1985), for the proposition that a broad management-rights proposal with a no-strike clause and a limited grievance and arbitration mechanism is not evidence of bad faith. But the *Rescar* Board explicitly relied on the fact that—in contrast to this case—the employer did not simultaneously maintain this combination of proposals as a package. Notwithstanding the majority’s claims, the Hospital did maintain this unlawful combination of proposals for 15 months, and under extant law, it makes no difference that the majority never presented its proposals as all-or-nothing. In further contrast to this case, the *Rescar* employer (1) did not propose to eliminate the just-cause standard and arbitration for discipline or discharge; (2) did not seek the power to change benefits at any time; and (3) did not propose to maintain unfettered discretion to determine wage increases.

<sup>18</sup> The Board has observed that a management-rights clause that permits the employer to alter or discontinue any benefit at any time is “at odds with the basic concept of a collective-bargaining agreement.” *Radisson Plaza Minneapolis*, supra, 307 NLRB at 95. The majority concedes that the Hospital proposed to retain the authority to unilaterally change the unit members’ terms and conditions of employment at any time but claims that *Radisson Plaza Minneapolis* is inapposite because that case also involved additional away-from-the-table misconduct. As discussed, I believe that the Hospital’s away-from-the-table conduct supports an inference of bad faith. Moreover, the overarching principle that

bargaining agreement, but also to violations of federal law.<sup>19</sup> Finally, the Hospital proposed a dispute resolution system that culminated not in binding arbitration, but rather in non-binding mediation.

The Hospital’s adherence to the poison-pill combination of the management-rights clause, no-strike clause, and absence of a grievance-arbitration clause is enough to establish bad-faith bargaining by itself, but there is more here, as I will explain.

## B.

The Hospital’s approach to bargaining over wages also supports a finding of bad-faith bargaining.

First, the Hospital presented its wage proposal as non-negotiable.<sup>20</sup> That approach is obviously contrary to the statutory duty to bargain in good faith.<sup>21</sup> Thus, the Board has long held that a “party who enters into bargaining negotiations with a ‘take-it-or-leave-it’ attitude violates its duty to bargain.”<sup>22</sup> Here, the Hospital “unlawfully sought agreement on its own terms and none other.”<sup>23</sup> Whatever small accommodations the Hospital made with respect to its proposal, its key position—that bargaining-unit employees would be placed on a hospital-wide pay scale,

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certain proposals demonstrate bad faith applies regardless. See e.g., *Prentice-Hall Inc.*, 290 NLRB 646, 646 (1988) (employer demand for sweeping waivers of employees’ statutory rights, while offering little in return, with no away-from-the-table evidence of bad-faith bargaining, was simply “not the behavior of an employer who is trying to achieve a collective-bargaining agreement.”); *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 609 (7th Cir.1979) (“Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to.”)

<sup>19</sup> The majority credits the Hospital for making a “significant concession” by eventually withdrawing the no-strike proposal. But the Hospital maintained this unlawful combination of proposals for 24 bargaining sessions over 14 months, which was more than enough time to frustrate the bargaining process. The Hospital only withdrew the no-strike proposal after the Union filed an unfair labor practice charge with the Board.

<sup>20</sup> My colleagues state that the judge was incorrect in finding that the Hospital refused to negotiate over the wage proposal. The Hospital, they say, invited a counter proposal, and the Union failed to test the Hospital’s willingness to bargain. Even assuming, contrary to the judge’s factual findings, that the Hospital invited a counteroffer and the Union did not make one, the Union was in no position to counter the Hospital’s proposal. The Hospital’s long-delayed initial wage proposal presented 18 months into bargaining and 12 months after the Union’s wage proposal, was incomplete. Despite repeated requests from the Union, the Hospital refused to tell the Union where unit members would be placed on the pay scales until October 11, 2018, 2 weeks before it withdrew recognition. Thus, the Union, without sufficient information to formulate a counter proposal, did not have the realistic opportunity to test the Hospital’s willingness to negotiate.

<sup>21</sup> As Justice Frankfurter observed, good faith bargaining “is inconsistent with a predetermined resolve not to budge from an initial position.” *NLRB v. Truitt Mfg.*, 351 U.S. 149, 154 (1956) (concurring opinion).

<sup>22</sup> *General Electric*, 150 NLRB 192, 194 (1964).

<sup>23</sup> *Regency Service Carts*, 345 NLRB 671, 672 (2005), citing *American Meat Packing Corp.*, 301 NLRB 835, 836 (1991).

with each employee's placement within that scale and any wage increases during the contract left entirely up to management—was “take it or leave it.”<sup>24</sup>

Second, of course, the terms of the Hospital's proposal—which gave management near-unfettered discretion over wage increases—are evidence of bad-faith bargaining, as long-standing Board precedent demonstrates. The Hospital's proposal was strikingly similar to the proposal in *A-1 King Size Sandwiches*, supra, where the employer sought to determine wage increases on the basis of semi-annual wage reviews, where it would make the final decision and had the exclusive right to evaluate, reward, promote and demote employees, leaving the union's participation in the process “meaningless.”<sup>25</sup> The prolonged adherence to such a proposal, as happened here, is compelling evidence of bad faith by itself, but even more so when viewed in the full context of the Hospital's proposals, which together reflect an intent to subvert the bargaining process.

### C.

Yet another illustration of the Hospital's subversive approach was its proposal to eliminate the contract's longstanding union security and dues-checkoff clauses—based on nothing more than a newfound philosophical opposition to such clauses.

For decades, the Board has held that “[w]hile the Act does not require that an employer grant a union's bargaining proposals for union-security and dues-checkoff provisions, the assertion of ‘philosophical’ objections does not satisfy the statutory obligation to bargain in good faith concerning these matters.”<sup>26</sup> Consistent with well-established Board law, the judge correctly found that the Hospital's proposal reflected bad faith.

The judge considered and rejected the Hospital's claim that the union security clause interfered with the

Hospital's recruitment of employees, determining that it was unsubstantiated. Indeed, the judge's finding is consistent with the Hospital's own characterization of its position. In its bargaining briefs, the Hospital touted the fact that its opposition to union security reflected its belief that “employees should have a choice as to whether or not to pay union dues” and asserted that “it's not fair to force employees to pay dues to keep their jobs at [the Hospital.]” In other words, by its own admission, the Hospital's bargaining position was based on philosophical opposition to union security. Such a position does not satisfy the duty to bargain in good faith. Reversing the judge, the majority insists that the Hospital's proposal was not exclusively based on its philosophical opposition to union security clauses. Citing evidence that the trier of fact found unpersuasive, the majority references testimony that the Hospital had received complaints about the union security clause. The Hospital's own repeated statements—that it was opposed to dues checkoff because it believed employees should not be required to pay union dues or fair share fees—are far more believable. The record simply does not support the majority's attempt to dismiss this evidence of bad-faith bargaining.

### D.

There is a final example of the Hospital's approach to bargaining that while relatively small in comparison to its other conduct, neatly illustrates its bad-faith desire to frustrate agreement: its regressive bargaining over whether disputes over employee discharges would be resolved through arbitration.

The Board will find that a regressive bargaining proposal—a less favorable proposal than one made earlier—is evidence of bad-faith bargaining when it is made without explanation or when the stated reason for the step

<sup>24</sup> Even if the Hospital eventually agreed to an initial flat wage increase upon contract ratification, any such increase was presented as contingent. The Union was required to accept a system that granted exclusively merit-based wage increases. Critically, the Hospital never wavered from its position that the Union would be excluded from any participation in determining wage increases during the life of the contract.

<sup>25</sup> 265 NLRB at 859. See also *Kitsap Tenant Support Services*, supra, 366 NLRB No. 98, slip op. at 8 (employer “sought to deny the [u]nion any role in establishing wage rates during the life of the contract”).

In reversing the judge, the majority cites the principle that an employer is free to propose to retain discretion over wage increases. *McClatchy Newspapers*, 321 NLRB 1386, 1391 (1996), enfd. in relevant part 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998). That principle has no application here. As the *McClatchy Newspapers* Board explained, an employer is free to negotiate objective procedures and criteria establishing discretionary wage increases. But the Board found the employer proposal there *unlawful* because the employer proposed open-ended wage increases based on no objective criteria and by-passing the union's role as bargaining representative. The Board found that such a proposal was “antithetical to our statutory system of

collective-bargaining meant to promote industrial stability.” Id. The Hospital's proposal here, with its reservation of unlimited managerial discretion to determine any wage increase during the life of contract, falls into this category.

<sup>26</sup> *Hospitality Motor Inn, Inc.*, 249 NLRB 1036, 1040 (1980), enfd. 667 F.2d 562 (6th Cir. 1982), cert. denied 459 U.S. 969 (1982). The Board has recently found evidence of bad-faith bargaining where an employer, “[t]hroughout negotiations ... consistently maintained proposals to eliminate the union security clause without advancing any business justification, let alone a legitimate business justification,” but instead “simply argued that people could voluntarily pay union dues, but that it should not be a condition of employment.” *Kalthia Group Hotels, Inc. and Manas Hospitality LLC d/b/a Holiday Inn Express Sacramento*, 366 NLRB No. 118, slip op. at 19–20 (2018). See also *CJC Holdings*, 320 NLRB 1041, 1047 (1996), affd. 110 F.3d 794 (5th Cir. 1997); *Chester County Hospital*, 320 NLRB 604, 622 (1995), enfd. 116 F.3d 469 (3d Cir. 1997); *Carolina Paper Board Co.*, 183 NLRB 544, 551 (1970). The majority assumes without deciding that it is unlawful for an employer to oppose union security and dues checkoff for philosophical reasons, but that proposition is unassailable under the Board's decisions.

backward appears dubious.<sup>27</sup> That is the case here. There is no dispute here that the Hospital engaged in regressive bargaining. It first made a discipline proposal providing that the parties would arbitrate disputes over discharges, as had been the case. Then, four months later, it made a dispute-resolution proposal under which discharge disputes would be addressed only through non-binding mediation. The Hospital's only explanation for this shift—that it was not aware of the terms of its discipline proposal when it made its dispute-resolution proposal—is both implausible and woefully inadequate. Grievance and arbitration provisions are a cornerstone of collective-bargaining agreements. A party seeking, in good faith, to eliminate an existing procedure would surely understand its own prior proposals, exercising due diligence. Here, in the context of the Hospital's overall conduct, it is not entitled to the benefit of the doubt.

Nevertheless, the majority credits the Hospital's explanation that the regressive proposal was made simply to resolve a discrepancy in its overall package of proposals.<sup>28</sup> Of course, the Hospital could just as easily have reconciled the two proposals by choosing to preserve binding arbitration for discharge disputes. Nothing compelled the Hospital to move backward, in other words, not even a supposedly inadvertent mistake. The Hospital's choice, consistent with its other bargaining proposals, evidences its desire to avoid an agreement, not reach one.

<sup>27</sup> See *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001), *enfd.* sub nom. *NLRB v. Hardesty Co., Inc.*, 308 F.3d 859 (8th Cir. 2002); *Houston County Electric Cooperative*, 285 NLRB 1213, 1214 (1987). “Regressive bargaining . . . is not unlawful in itself; rather it is unlawful if it is for the purpose frustrating the possibility of agreement.” *U.S. Ecology Corp.*, 331 NLRB 223, 225 (2000), *enfd.* 26 Fed. Appx. 435 (6th Cir. 2001).

<sup>28</sup> The majority obscures the realities of the situation when it accuses the Union of regressive bargaining. Eighteen months into bargaining, the Union offered to accept a management-rights clause from a different contract between the parent company and the union. By that point, the parties had reached tentative agreement on aspects of the Hospital's proposed management-rights clause, a reflection of the Union's willingness to make reasonable concessions. But the parties were still in fierce dispute over significant provisions in the management-rights clause because the Hospital refused to step back from using the clause to eviscerate the contract. After months of the Hospital's recalcitrance, the Union proposed a new management-rights clause as a clear attempt to move the negotiations forward. This is not an example, then, of the Union withdrawing from a tentative agreement without good cause.

<sup>29</sup> For that reason, my colleagues attempt to distinguish *Altura Communication*, *supra*, based on whether the offers were final is unpersuasive. It is, in fact, the commonalities between this case and *Altura Communication* that are striking. Both cases involve employers' prolonged adherence to a combination of proposals that would leave employees with fewer rights than they would have had without a contract. Both

#### IV.

The obvious conclusion here, in light of Board precedent and the record evidence, is that the Hospital engaged in bad-faith bargaining, succeeding in its goal to frustrate agreement and to oust the Union. The majority offers a series of excuses for the Hospital's conduct, but none are persuasive. They amount to blaming the victim for the crime.

First, without giving proper weight to the nature of the Hospital's proposals and its apparent aim in making them, the majority insists that the Union failed to test the Hospital's willingness to bargain. The facts are to the contrary. As discussed, over the course of 30 bargaining sessions spanning almost 2 years, the Union repeatedly attempted to persuade the Hospital to abandon or modify its proposals. The Hospital, however, steadfastly refused to seriously consider making any significant concessions.

Second, the majority argues the Hospital's proposals did not evidence bad faith because they supposedly were not final offers. Of course, the fact that the Board has found that an employer engaged in bad-faith bargaining by presenting unreasonable final offers does not mean that *only* final offers can demonstrate bad faith.<sup>29</sup> Indeed, the Board, with judicial approval, has previously rejected the argument that a union faced with unreasonable employer proposals needs to await a final offer before it can successfully demonstrate that the employer is violating its statutory duty to bargain in good faith.<sup>30</sup> A union is not “compelled to continue [a] charade.”<sup>31</sup> Unfortunately, a charade is precisely what the Union confronted here.

cases involve employer proposals to retain the right to unilaterally change almost every significant terms and conditions of employment, including the existence of bargaining unit work. In both cases, any wage increase during the term of the contract would be at management's discretion. And in both cases, the employer sought absolute control over terms of employment coupled with no-strike provisions. My colleagues contend that there are meaningful distinctions between the no-strike provisions, but the no-strike provision at issue here was sweeping: it prohibited employees from participating in any strike or any picketing for any reason, including any violation of the contract or of the law.

<sup>30</sup> See e.g., *Wright Motors*, 237 NLRB 570 (1978), *enfd.* *NLRB v. Wright Motors*, 603 F.2d 604, 609–610 (7th Cir. 1979). In *Wright Motors*, the Board and circuit court rejected the employer's argument that a bad-faith finding was premature because the parties had only held three bargaining sessions over 6 months. See also *Hydrotherm, Inc.*, 302 NLRB 990, 994 (1991) (rejecting the employer's contention that its proposals were not unlawful because it was deprived of an opportunity to reveal its willingness to compromise by the union's filing of unfair labor practice charges).

<sup>31</sup> In *Wright Motors*, *supra*, the Seventh Circuit explained that if “the negotiations were not progressing because of the employer's insistence on unreasonable provisions, the Union should not be compelled to continue the charade for more sessions before asserting its statutorily protected right.” 603 F.2d at 608.

My colleagues seek to distinguish *Wright Motors* because the no-strike proposal there was more punitive. Contrary to the majority's



Third, the majority finds fault in the Union's counterproposals, particularly where the Union orally rejected some of the Hospital's contract proposals. The record is clear, though, that the Union made written and oral counterproposals on many of the Hospital's proposals, and that the Union made concessions to the Hospital's demands.<sup>32</sup> In the majority's version of events, the Hospital simply exploited its superior bargaining position to force concessions from the Union, which failed to appreciate its weakness and to make the appropriate concessions. Collective bargaining, though, "is not a cutthroat death match," *AFGE v. Trump*, 318 F. Supp. 3d 370, 432 (D.D.C. 2018) rev'd on other grounds, 929 F.3d 748 (D.C. Cir. 2019), and it does not serve the policies of the Act for us to treat it as such. What the evidence shows is that the Hospital sought to use its leverage not to seek more favorable contract terms, but to destroy the collective-bargaining relationship. That is not bargaining in good faith, nor was the Union required to capitulate to save itself. It was permitted to propose adherence to the existing contract that embodied a 20-year relationship. There is no allegation here that the Union violated its own duty to bargain in good faith.

Fourth, the majority asserts that the Respondent did not engage in bad-faith bargaining because it offered concessions from its original proposals. But the majority vastly overstates the significance of those concessions.<sup>33</sup> The only meaningful concession was the withdrawal of the no-strike proposal, which the Hospital maintained for 15 months and which was withdrawn only in response to the Union's unfair labor practice charge. Otherwise, as explained, the Hospital maintained fundamentally the same position throughout the negotiations.

Fifth, the majority places great emphasis on the conduct of Union negotiator Godoff. Boorish as Godoff might have been, his behavior does somehow not excuse the Hospital's bargaining approach—an approach that may well have provoked Godoff to begin with. The Board has rejected the proposition that a negotiator's offensive behavior (short of conduct that itself constitutes bad-faith bargaining) excuses a party from meeting face-to-face, much less that it justifies engaging in surface bargaining.<sup>34</sup>

Finally, the majority also implies that the Union should have tried harder to bargain over the Hospital's proposals,

rather than filing unfair labor practice charges. Of course, if those charges have merit, that is all that matters. Here, in any case, the Union did not simply file charges and stop bargaining. It continued to bargain for 7 months until the Hospital withdrew recognition, walked away from the bargaining table, and welcomed employees to the "team of non-union employees."

## V.

The Supreme Court has observed that the "object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employers."<sup>35</sup> The result here does not help achieve that object. The Hospital's conduct was not just bad-faith bargaining, it was egregious bad-faith bargaining. It was the Hospital, not the statute, that it achieved its object in this case: avoiding a new agreement and ousting the Union, after 20 years. Neither Board law, nor the record evidence support the majority's decision today. Accordingly, I dissent.

Dated, Washington, D.C. April 30, 2021

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Lauren McFerran,

Chairman

## NATIONAL LABOR RELATIONS BOARD

*Barbara Duvall and Andrew Andela, Esqs.*, for the General Counsel.

*Tammie Rattray and Paul Beshears, Esqs. (Ford Harrison LLP)*, of Tampa, Florida and Atlanta, Georgia,

*Steven Bernstein, Esq. (Fisher & Phillips)*, of Tampa, Florida, for the Respondent.

*Stephen Godoff, Esq., (Abato, Rubenstein & Abato, PA)*, of Baltimore, Maryland, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Washington, District of Columbia on June 18–20, 2019. The complaint alleges that District Hospital Partners, L.P. d/b/a The George Washington University Hospital, a Limited Partnership, and UHS of D.C., Inc., General Partner (the Hospital or

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suggestion, it makes no difference that the proposals here and in *Wright Motors* are unlawful in different ways.

<sup>32</sup> The majority cites no case supporting the position that the Board requires any party to submit written counterproposals. Nor do the facts here support an inference that the bargaining process was hampered by the Union's oral counteroffers. Indeed, when, as here, an employer proposes radical changes in an existing agreement, and the union wants to retain current contract language, oral proposals are surely enough to communicate the union's position.

<sup>33</sup> *NLRB v. Wright Motors*, supra, 603 F.2d at 609 (observing that the employer did not make "bona fide concessions on substantial issues.").

<sup>34</sup> *Success Village*, 347 NLRB 1065, 1067 & 1081 (2006). The Board has explained that the "obligation to bargain also imposes the obligation to thicken one's skin and to carry on even in the face of what otherwise would be rude and unacceptable behavior." *Victoria Packing Corp.*, 332 NLRB 597, 600 (2000).

<sup>35</sup> *Auciello Iron Works v. NLRB*, supra, 517 U.S. at 785.

Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)<sup>1</sup> by failing and refusing to bargain in good faith and with no intention of reaching an agreement for a successor collective-bargaining agreement with 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region A/W Service Employees International Union (the Union) as the exclusive collective-bargaining representative of its employees. The complaint further alleges that the Hospital improperly withdrew recognition from the Union after nearly 2 years of bad faith and regressive bargaining, subsequently rejected the Union's request to continue bargaining and immediately proceeded to implement unilateral changes to employees terms and conditions of employment.

At hearing, the General Counsel moved to amend the complaint to further allege that Hospital representatives improperly interrogated potential employee witnesses.

The Hospital disputes the allegations and contends that it engaged in hard, but good faith, bargaining over the course of 30 bargaining sessions. It contends that it withdrew recognition from the Union only after it received objective evidence from a majority of employees in the bargaining unit that they no longer wished to be represented by the Union for purposes of collective bargaining. Even if it did engage in any unfair labor practices during bargaining, the Hospital avers that none caused the disaffection that eventually developed among a majority of the bargaining unit. Since the withdrawal was proper, the Hospital contends that it was then entitled to implement unilateral changes to employees' terms and conditions of employment, as well as notify employees that the changes were related to the Union's shortcomings and their newfound status as nonunion employees. Finally, the Hospital denies that its counsel coercively interrogated employees in preparation for hearing and that they properly advised the employees of their rights, including the right to decline to give testimony without threat of reprisal.

On the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses,<sup>3</sup> and after considering the briefs filed by the General Counsel, the Hospital and the Union, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Hospital, a limited partnership, is engaged in providing short-term acute medical care to the general public from its health care facility in Washington, D.C. In conducting such business operations, the Hospital annually derives gross revenues in excess of \$250,000 and receives goods and materials valued in excess of \$5,000 directly from points outside of Washington, D.C. Additionally, the Hospital's business operations within the District of Columbia are encompassed by the National Labor Relations Board's (the Board) plenary jurisdiction over enterprises in that

jurisdiction. The Hospital admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a healthcare institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. *The Parties' Collective Bargaining History*

The Hospital is jointly owned by George Washington University and District Hospital Partners, L.P. District Hospital Partners, L.P. is a subsidiary of Universal Health Services, Inc. (UHS). The Union represents a bargaining unit of about 150 regular full-time and regular part-time employees in the Environmental Services (EVS), Linen Services, Ambulatory Care Center, and Food Services (Dietary) departments of George Washington University Hospital (the bargaining unit).

The Hospital's recognition of the Union has been embodied in successive collective-bargaining agreements spanning more than 20 years.<sup>4</sup> The most recent agreement was effective from December 20, 2012 through December 19, 2016 (the CBA). That agreement, as well as the one before it, were negotiated within a week and without the assistance of counsel. The CBA defines the bargaining unit, in pertinent part, as follows:

##### Article 1 – Recognition

Section 1.1 The Employer recognizes the Union as the exclusive bargaining agent for a unit of all regular full-time and regular part-time employees of the Employer in the Environmental Services, Linen Services, Ambulatory Care Center and Food Services Department of George Washington University Hospital. The job classifications are named in Section 2 below, but excluding, all executive, professional, technical, clerical, and supervisory employees (including foreman), temporary employees, guards, employees not regularly scheduled for a standard workweek of twenty (20) or more hours, and all other employees in job classifications not specifically named in Section 1.2 below.

##### Section 1.2

Crew Leader, Environmental Services  
Service Worker  
Service Worker Trainee  
Senior Service Worker  
Linen Service Worker Trainee  
Linen Service Worker  
  
Cook I  
Cook II  
Utility Worker  
Food Service Worker

bargaining sessions. I received all of the notes over objection of the General Counsel. The notes did not always capture the detailed exchanges between the parties. They did, however, cover the topics covered at the meetings and were corroborated in most instances by witness testimony, subsequent correspondence, and exchanged proposals and counterproposals. (R. Exh. 3.)

<sup>4</sup> GC Exh. 30.

<sup>1</sup> 29 U.S.C. §§ 151-169.

<sup>2</sup> The parties' joint motion to correct the record, dated July 31, 2019, is granted.

<sup>3</sup> There were very few credibility issues in this case. An unidentified hospital employee took notes of the sessions. The General Counsel introduced selected portions of those bargaining notes, while the Hospital moved at the conclusion of the hearing to admit the notes for all 30

Nutrition Associate

Section 1.3 For purposes of this Agreement, the following terms have the meanings stated below:

- (a) "regular full-time employee(s)" means employee(s) in a bargaining unit who hold regular full-time positions and who are regularly scheduled to work forty (40) hours per week;
- (b) "regular part-time-employee(s)" means employee(s) in a bargaining unit who hold regular part-time positions and who are regularly scheduled to work twenty (20) or more hours per week; any regular part-time employee working over 35 hours a week shall receive an additional twenty cents (20) an hour to his or her straight-time hourly rate for each hour worked from 36 to 40. If an employee works in excess of 40 hours per week[,] such additional amount will not be paid;
- (c) "temporary employee(s)," excluded from bargaining units, means employees who are identified as temporary employees on Employer records and are hired for a period of no longer than six (6) months, or whose temporary status is subsequently renewed for periods not to exceed three (3) months, or who are hired to replace one or more employees who are absent on leave from work, even if for longer than (6) months;
- (d) "employee(s)" as hereinafter used means both regular full-time employees and regular part-time employees as defined above, unless a provision applies only to one of these categories of employees, in which case the term shall include only the category of employee to which the provision applies.

Other provisions that figured prominently in the bargaining at issue include the following relating to union security, wages and the grievance/arbitration process:

Article 2 – Union Security

Section 2.1 The Employer agrees that as a condition of continued employment, all employees who are presently members of the Union shall maintain said membership, and all employees who are not presently members of the Union and all new employees shall become members on the first day of the first full calendar month which follows completion of sixty (60) days of employment, or the thirtieth day following the effective date of this Agreement, whichever is later. The Employer agrees to provide the Union with a quarterly report of new members, their addresses and job titles.

Section 2.2 Membership in the Union, insofar as this Agreement is concerned, shall mean that an employee tenders the periodic dues and initiation fees uniformly required by the Union as a condition of acquiring or maintaining membership therein.

Section 2.3 The Employer further agrees that upon request of the Union it will discharge any employee who in accordance with the above, fails to tender the periodic dues and initiation fees uniformly required to obtain and maintain membership in said Union.

Section 2.4 The Union agrees to indemnify and hold the Employer harmless from any and all claims, suits, judgments, attachments, and any other liability resulting from the Employer's actions in accordance with this Article.

Article 7 – Wage Rates

Section 7.1(a) Effective January 1, 2013, employees on the payroll as of that date shall Receive a pay increase of two percent (2%) of their present straight time hourly rate.

Effective January 1, 2014, employees on the payroll as of that date shall receive a pay increase of two percent (2%) of their present straight time hourly rate.

Effective January 1, 2015, employees on the payroll as of that date shall receive a pay increase of two percent (2%) of their present straight time hourly rate.

Effective January 1, 2016, employees on the payroll as of that date shall receive a pay increase of one percent (1 %) of their present straight-time hourly rate.

(b) If any employee's straight-time hourly rate of pay, upon being increased as provided above, is less than the straight-time hourly rate for his/her job classification as listed in the relevant column of Exhibit 3, the employee's straight-time hourly rate will be the higher rate, and whichever straight time hourly rate is higher will be used as the basis for computing all paid leave and other benefits provided under this Agreement.

Section 7.2 Employees who are hired on or after the date of execution of this Agreement or who transfer to a new job classification on or after the date of execution of this Agreement will be hired or transferred in accordance with the hourly rates of pay set forth in Exhibit 3; provided that in the case of a transfer to a job classification in the same or a higher pay grade, the employee may retain his/her former hourly rate of pay, if higher.

Section 7.3 An employee shall receive a shift differential forty (\$.40) cents per hour over his/her straight-time hourly rate for hours worked between 7:00PM and 5:00AM. No shift differential will be paid for any hours for which an employee is paid at a time-and-a-half (1½) or greater rate.

Section 7.4 An employee shall receive a weekend differential thirty (\$.30) cents per hour-over his/her straight-time hourly rate for hours worked between 12:00 AM Saturday and 12:00 AM Monday. No shift differential will be paid for any hours for which an employee is paid at a time-and-a-half (1½) or greater rate.

Section 7.5 It is understood and agreed that an employee from a lower classification assigned to perform one (1) hour or more per day in a classification paying a higher rate Section 8.1 of pay per hour as set forth in Exhibit 3 shall receive the higher rate of pay for all hours worked in the higher classification. Nothing in this Agreement, however, shall be construed to prohibit the employee from performing tasks as a trainee for a higher paid classification at his/her regular rate for a period not to exceed 2 months. An employee may be assigned to perform work in a lower classification when emergencies or unpredictable events occur which prevent the normal operational schedule to be followed, but in such temporary instances will retain his or her regular rate of pay per hour.

Article 18 – Grievance and Arbitration

Section 18.1 General. A grievance is defined as a complaint

by the Union over an alleged violation of any specific provision of this Agreement that occurs during its term. A grievance shall be in written form, signed and dated by an authorized union representative.

Section 18.2 Time Limits, "Working days" as used in this Article means Monday through Friday, excluding observed holidays. Unless the parties have agreed in advance in writing to a specific extension of time, any grievance or demand for arbitration which is not filed by the Union at each step within the time limits contained herein is waived and the grievance is deemed to be concluded in accordance with the Employer's decision, and there shall be no further processing of the grievance or any arbitration delivery in writing by person or by mail, and if filing is by mail, the date of the official U.S. Postal Service postmark shall be the date of filing.

Section 18.3 Meetings. If the authorized Union representative or the aggrieved employee fails to attend a scheduled grievance meeting without prior notification to the Employer, the grievance shall be deemed concluded in accordance with the Employer's decision and there shall be no further processing of the grievance or any arbitration thereon.

Section 18.4 Steps 1, 2 and 3. Except as provided in Section 18.4 (d) below, Steps 1, 2 and 3 are as follows:

(a) Step 1. A grievance shall be filed at Step 1 with the supervisor within ten (10) working days after the action on which the grievance is based. The parties may agree to hold a meeting at this Step. If the grievance is not settled or denied by the supervisor or his/her designee within five (5) working days after it is filed at Step 1, the grievance shall be deemed denied at the expiration of such five (5) working days and the Union may, proceed to file the grievance at Step 2 as provided below.

(b) Step 2. A grievance shall be filed at Step 2 with the department head, within five (5) working days after the grievance is denied at Step 1. A meeting for the purpose of attempting to resolve the grievance shall be held at this Step. If the grievance is not settled or denied by the department head or his designee within ten (10) working days after it is filed at Step 2, however, the grievance shall be deemed denied at the expiration of such ten (10) working days and the Union may proceed to file the grievance at Step 3 as provided below,

(c) Step 3. Within five (5) working days after the grievance is denied at Step 2 a grievance shall be filed at Step 3 with the Director of Human Resources. A meeting for the purpose of attempting to resolve the grievance shall be held at this Step. If the grievance is not settled or denied by the Director of Human Resources or his/her designee within ten (10) working days after it is filed at Step 3, however, the grievance shall be deemed denied at the expiration of such ten (10) working days and the Union may proceed to invoke the arbitration procedure as provided in Section 18.5 below.

(d) Discharges: Discipline Imposed by Department Head. A

grievance which arises from a discharge or from disciplinary action imposed directly by the department head shall start at Step II instead of Step I and shall be filed within ten (10) working days after the action on which the grievance is based. All other provisions of Section 18.4 shall apply.

Section 18.5 (a) Demand for Arbitration. A written demand for arbitration shall be filed by the Union with the Director of Human Resources within thirty (30) working days after the grievance is denied at Step 3. At the same time, the Union will request the Federal Mediation and Conciliation Service (with a copy to the Employer) to furnish a list of not less than nine (9) arbitrators. Selection shall be made by the Union and then the Employer representatives alternatively striking any name from the list until only one name remains. The final name remaining shall be the arbitrator of the grievance.

(b) Authority of Arbitrator. The arbitrator shall have no authority to hear and determine any case that has not been processed and submitted to him/her in accordance with the time and procedural requirements of the Article unless the parties have specifically agreed in writing to a waiver of the particular requirements. The arbitrator's authority and his/her opinion and award shall be confined exclusively to the specific provision or provisions of this Agreement at issue between the Union and Employer. The arbitrator shall have no authority to add to, alter, amend, or modify any provision of this Agreement. The arbitrator shall not hear or decide more than one grievance without the mutual consent of the Employer and the Union. The arbitrator shall render a decision as expeditiously as possible, and no later than thirty (30) working days after the close of the hearing, unless otherwise agreed to. The award in writing of the arbitrator within the proper jurisdiction and authority as specified in this Agreement shall be final and binding on the aggrieved employee, the Union and the Employer. Before either party files an action in court to enforce or vacate an arbitrator's award, the

(c) Expenses. The Union and the Employer shall each bear its own expenses in any arbitration proceedings, except that they shall share equally the fee and other expenses of the arbitrator in connection with the grievance submitted.

#### *B. Overview of the Bargaining Period*

The Hospital and the Union met for 30 sessions between November 2016 and October 2018. The Hospital's bargaining team was led by outside counsel Steven Bernstein and Jeanne Schmid, the Hospital's vice president of labor relations. Both were new to the bargaining relationship, although Bernstein had represented the Hospital since 2014 during the decertification of the Hospital security officers' union. Other Hospital negotiators included supervisors Rhonda Evans, Eric McGee, Makita Miller and Robert Trump. The Union's lead bargainiers included outside counsel Stephen Godoff<sup>5</sup> and Brian Esders, Union representatives Lisa Wallace,<sup>6</sup> Antoinette Turner and Yahnae Barner, and unit employees Cynthia Bey, Pamela Brooks, Aisha Brown, Marcia Hayes, Sonya Stevens and Arlene Smith.

<sup>5</sup> Godoff admitted he used profanity on numerous occasions during the bargaining sessions and never heard that type of language from Bernstein or Schmid. (Tr. 80-91.)

<sup>6</sup> Although not clarified in the record, I find that Lisa Wallace subsequently changed her name to Lisa Barnes.

The parties met at the Hospital's administrative offices, some distance from the medical center, on K Street in Washington, D.C. for negotiations on the following dates:

- |                       |                       |
|-----------------------|-----------------------|
| 1. November 21, 2016  | 2. November 22, 2016  |
| 3. December 6, 2016   | 4. December 7, 2016   |
| 5. December 21, 2016  | 6. December 22, 2016  |
| 7. January 17, 2017   | 8. January 31, 2017   |
| 9. February 1, 2017   | 10. February 22, 2017 |
| 11. February 23, 2017 | 12. March 28, 2017    |
| 13. March 29, 2017    | 14. April 5, 2017     |
| 15. April 6, 2017     | 16. May 16, 2017      |
| 17. June 12, 2017     | 18. July 12, 2017     |
| 19. July 31, 2017     | 20. October 6, 2017   |
| 21. January 17, 2018  | 22. February 13, 2018 |
| 23. May 18, 2018      | 24. May 21, 2018      |
| 25. July 31, 2018     | 26. August 1, 2018    |
| 27. September 5, 2018 | 28. September 6, 2018 |
| 29. October 10, 2018  | 30. October 11, 2018  |

### C. The Bargaining Sessions

#### 1. November 21 and 22, 2016 Bargaining Sessions

At the first bargaining session on November 21, 2016, the parties discussed the scheduling of bargaining sessions and time allocated to each, whether employee negotiators would be compensated by the Hospital for their time at bargaining, and various other "housekeeping" items. From the outset and on numerous occasions thereafter, Bernstein and Schmid stressed that they sought to substantially alter many of the CBA provisions on the grounds that they were antiquated and ambiguous in various respects.<sup>7</sup>

The second day of negotiations on November 22, 2016 focused on weather related transportation issues, the usage of cots, proposed changes to Articles 25 (union announcements & conferences) and 28 (personnel folders), and a new article on restricted access to hospital and patient care areas. The Union gave verbal counter-offers to the recognition and nondiscrimination clauses.<sup>8</sup> The contentiousness of the negotiations due to a previous labor/management committee dispute surfaced in several snide comments by Turner.<sup>9</sup>

Following those bargaining sessions, the Hospital issued its first "Bargaining Brief" (bargaining brief) to supervisors on December 1, 2016, which included the following "talking points:" the union has communicated with hostility and has not provided any proposals or responses to the proposals introduced by the hospital. They have not been prepared; as a result, the meetings have been unproductive unfortunately; This is the first time GWUH is presenting a bargaining brief and we do not believe

the union will be happy with us doing so. Therefore, please be vigilant as union presence may increase as soon as today."<sup>10</sup>

#### 2. The December 6 and 7, 2016 Bargaining Sessions

With the CBA about to expire on December 19, 2016, the parties resumed bargaining on December 6 and 7. On December 6, Bernstein presented the Union with proposed sweeping changes to Article 30, the management rights clause, which had been embedded in all of the predecessor agreements between the parties.<sup>11</sup> The proposal reserved the Hospital's rights to: (1) assign any amount of bargaining unit work to supervisors; (2) use contractors and contract personnel to perform bargaining unit work; (3) engage in searches of unit employees without limit; (4) discipline employees without cause; (5) change employees' health insurance and other benefits at any time; (6) determine what positions are and are not part of the unit; (7) determine the existence of bargaining unit work; and (8) determine the extent to which bargaining unit work could be performed at all. Along with its management rights proposal, the Hospital also proposed to nullify past practices:

The parties further agree that all past practices, side agreements of understandings, verbal or written, of every kind and nature which may have developed or existed prior to the effective date of this Agreement are superseded and extinguished by this Agreement and, effective with execution of this Agreement, shall be wholly void and without force and effect. Nothing contained in this Article shall be construed as impairing or limiting the Hospital's Management Rights . . . including, without limitation, the Hospital's right to make, change and enforce rules, regulations and policies governing employment and conduct of employees on the job.

After the Hospital began posting contentious bargaining briefs, the Union brought Godoff into the negotiations on December 7, 2016. Godoff started off with a bang, accusing the Hospital of creating an atmosphere that was very difficult to negotiate in and questioning its interest in arriving at a new contract.<sup>12</sup> At one point, he also referred to the Hospital's personnel folders proposal as "a nothing burger" and "an absolute waste of everyone's time."<sup>13</sup>

By the end of bargaining on December 7, the Union had tendered counteroffers for the recognition clause, non-discrimination clause and personnel folders.<sup>14</sup> It rejected the distribution and solicitation proposal, while the Hospital rejected the hostile environment side letter and proposed a job posting provision.

On December 9, 2016, Schmid distributed the Hospital's second bargaining brief asserting, in pertinent part, that the Union had a different negotiator each day, did not bring a computer or

<sup>7</sup> Godoff confirmed that the CBA could use some updating, but not to the drastic extent that the Hospital's negotiators sought. (Tr. 77; R. Exh. 3 at 6, 50, 85, 177.)

<sup>8</sup> R. Exh. 5.

<sup>9</sup> R. Exh. 3 at 24–26.

<sup>10</sup> Following nearly every bargaining session, the Hospital required supervisors to read and distribute bargaining briefs to unit employees at pre-shift meetings. Along with some of the bargaining briefs were "talking points" for supervisors to share with bargaining unit employees. (GC Exh. 40.)

<sup>11</sup> The Hospital's rationale for the proposal was that the management rights language in the current and earlier contracts was outdated and required clarification. (GC Exh. 2; R. Exh. 1 at 3542–3543.)

<sup>12</sup> Godoff conceded that he used profane language at various times but noted that the voices were raised on both sides. (Tr. 80–81; R. Exh. 3 at 45.) Indeed, the Hospital's bargaining notes reflected numerous instances in which Wallace and Schmid interrupted each other.

<sup>13</sup> R. Exh. 3 at 49.

<sup>14</sup> R. Exh. 5.

printer and objected to the bargaining brief posted after the last meeting. The brief concluded with a reminder that Hospital management was available to answer any questions about bargaining. Schmid's subsequent email on December 11 also reminded supervisors not to "review, discuss or sign any petition, or anything that looks like a petition with anyone," since "doing so will disrupt the integrity of the process."<sup>15</sup>

### 3. The December 21 and 22, 2016 Bargaining Sessions

By the December 21, 2016 session, the proposed ground rules from the November 21 session had still not been agreed upon. As he sought to do at the outset of every session, Bernstein reviewed the status of all of the proposals during every session, which Godoff found useful because of the infrequency of the bargaining sessions. Negotiations began with discussion of changes to job postings, visitation and bulletin boards. The Union presented language that was used in a contract with Georgetown Hospital, which the Hospital rejected. Godoff mentioned that the Union had a good relationship with Georgetown Hospital. Schmid responded that "we're not Georgetown."<sup>16</sup>

On December 22, 2016, the parties discussed the Hospital's proposals to modify Article 6 (hours for employees), specifically, procedures for calling out late and absences. The parties did not agree on any terms; Godoff characterized the Hospital's proposal to authorize termination based on a few absences as draconian and unprecedented. Bernstein's proposal to meld Articles 15 (layoff and recall) and 23 (seniority) was also rejected. The Union opposed these changes as well because they diminished seniority by authorizing layoffs based on performance evaluations rather than seniority. Godoff expressed the Union's dismay to such a proposal: "If you're hell bent on these kinds of things we will end up with a fight. Some things are so important will wind up being at war. War with SEIU."<sup>17</sup>

### 4. The January 17, 2017 Bargaining Session

On January 17, 2017, the Hospital provided the Union with a proposal to replace Article 22 (Suspension and Discharge) with a draft entitled "Discipline."<sup>18</sup> Among the substantial departures from the longstanding language appearing in Article 22 were provisions: (1) deleting "just cause" language; (2) excluding any discipline short of discharge from "the full grievance and arbitration procedure;" (3) placing limits on employees' right to union representation at investigatory interviews; (4) allowing the Hospital to rely on final written warnings for four years; and (5) permitting the Hospital to apply progressive discipline "where appropriate," and to skip steps for certain enumerated infractions, as well as "any other incident [or event] that the Hospital deems as a major [or egregious] infraction of employee conduct or work rules." During the ensuing discussion, the Hospital took the position that discipline, with the exception of termination, should be grieved and not arbitrated.<sup>19</sup>

The parties also resumed discussion over the Hospital's

proposal to replace Articles 15 and 23 relating to seniority, layoff and recall. The expired CBA did not contain a time limit on recall rights; however, the Hospital proposed limiting the time period for recall to 2 months from the date of layoff. The Hospital also proposed eliminating 2 weeks of severance pay; the Union countered verbally, which Schmid found to make the negotiations very difficult. Godoff called the proposal "disgusting . . . Gratuitous bull shit and nastiness I have no interest in [discussing]. Proposal is so mean spirited it is a disgrace . . . Management flexibility my ass." Notwithstanding the emotional response, Godoff signaled a willingness to counter the proposal. In the meantime, he countered with a proposal that the Hospital agree to restoration of Article 15.4 which provides for 2 weeks of severance pay to laid-off employees with at least 6 months of service.<sup>20</sup>

Two days later, the Hospital circulated a bargaining brief summarizing the topics discussed and pointing out that "[d]uring these sessions the union formally proposed: Nothing." The brief also denounced the Union's conduct during the sessions and limited availability:

- Starting with these January bargaining sessions, the union has refused to continue to meet with the Hospital's bargaining team during working hours. The union is insisting on meeting in the evenings because the Hospital agreed to pay the union's bargaining committee members for their time at the table only through the end of the last year. The Hospital has maintained that the union should pay their own bargaining committee, since the committee is bargaining on behalf of the union, not the Hospital. The union, however, refuses to do so.
- Instead the union now wants to meet in the evenings for half of the time we had previously spent in bargaining each day. Instead of meeting for approximately 7 hours from 10 am to 5 pm each day, the union wants to meet from 4pm to 7:30 pm – with a break for dinner. The union acknowledged that this is likely to slow down the pace of bargaining significantly.
- Yesterday afternoon, we were in bargaining for 30 minutes when the union took a 45 minute break for dinner. We met together for 45 more minutes after their dinner, and then we ended for the evening. In the short time that we were together at the bargaining table:
  - The union's chief negotiator spent the first twenty minutes of valuable time cursing and yelling at the Hospital's bargaining team;
  - The Hospital's chief negotiator made clear that its committee was prepared to walk out if that continued;
  - The union informed the Hospital that it is no longer able to negotiate on any Fridays, forcing us to change an already agreed-upon date to accommodate that new restriction.
  - Despite the fact that the Hospital's counsel has repeatedly asked for written counter-proposals, the union

<sup>15</sup> GC Exh. 36.

<sup>16</sup> R. Exh. 3 at 66.

<sup>17</sup> R. Exh. 3 at 90–93.

<sup>18</sup> GC Exh. 4; R. Exh. 1 at 3561–3563.

<sup>19</sup> Bernstein initially asserted on direct examination that the arbitration provision in the Hospital's discipline proposal was a mistake or "error"

and "inaccurate," but when pressed on cross-examination he admitted that it was in fact not a mistake and the parties actually discussed the arbitration provision when the Hospital introduced the disciplinary proposal. (Tr. 42–44, 118–119, 188–190, 554–556, 597–599, 608–609; GC Exh. 46; R. Exh. 3 at 98–109.)

<sup>20</sup> R. Exh. 3 at 100–105.

provided none and informed the Hospital that it would not be able to provide any written counters in the evening because there was no one in their offices in Baltimore to type the proposals at that time. But, it is the union that is insisting on meeting in the evening.

The brief concluded with the dates of the next sessions and a reminder that “your leadership and the senior leadership team” were available to answer any questions about bargaining.<sup>21</sup>

#### 5. The January 31 and February 1, 2017 Bargaining Sessions

At the January 31, 2017 bargaining session, the Union provided a written counterproposal to the Hospital’s proposed disciplinary proposal to replace Article 22.<sup>22</sup> The Union proposed, among other things: (1) that employees be notified within a certain period of time of discipline; (2) that the Hospital produce the work rules it referenced in its discipline proposal; and (3) for final written warnings to be added to the list of arbitrable actions. The Hospital countered in writing and agreed to some notification to employees of the discipline; to a deadline by which discharged employees must be paid; that employees would not be disciplined in public; and to strike the catch-all provisions regarding conduct exempt from progressive discipline.<sup>23</sup> The parties also discussed several outstanding items, including personnel files, non-discrimination, recognition clause, solicitation, job postings and seniority/layoff and recall.

When the parties met on February 1, 2017, the Union tendered a counterproposal to the Hospital’s management rights proposal by accepting 22 of its 26 subsections. The Union also agreed to the Hospital’s introductory language, with the exception of a portion permitting the Hospital to subcontract services or products.

The bargaining brief issued by the Hospital on February 2 listed the pending proposals by the Hospital and the Union, as well as a detailed summary of the positions of the parties during bargaining, and accused the Union of dragging out negotiations:

The evening sessions are much shorter than the sessions we were attending during the day. We now typically begin after 4:00 and end at 7:30 pm, with a break for the union’s dinner. The amount of actual time spent in bargaining is now less than 2 hours per day. Unfortunately, at this pace, it could take longer to work through the process.<sup>24</sup>

#### 6. The February 22 and 23, 2017 Afternoon Bargaining Sessions

During the February 22 session, the parties exchanged proposals relating to discipline, solicitation and notification of job postings, and discussed revisions to the bargaining unit, probationary periods and eligibility for benefits, and minimum work hours for full-time employees. The Hospital also tendered a proposal to revise Article 28 (personnel folders). The parties

tentatively agreed to the proposals regarding discipline. On several occasions during these sessions, the Union’s negotiators expressed a sense of urgency about the need to move to the economic issues.

At the conclusion of the session, Turner noted that “[w]e have to start economics why can’t you give a non-economic proposals. Your strategy is to prolong. You won’t want to pay these employees and pay retro.” Bernstein ignored her comment and went on to discuss the need to revise the arbitration language.

At the outset of the February 23 bargaining session, Godoff expressed frustration with the pace of negotiations and insisted that the parties agree to on more than 2 half-days per month. Bernstein replied that the Hospital was only willing to schedule two full days of bargaining per month. Godoff responded by threatening to file charges. Bernstein invited the Union to propose dates and Turner replied with twelve dates in March and April. Bernstein immediately replied by agreeing to schedule two dates for bargaining – April 5 and 6, 2017. Turner replied that members had been limited to the afternoon/evening sessions, which Bernstein recognized was due to the fact that the Hospital refused to compensate unit employees for time spent attending collective bargaining after the CBA expired.<sup>25</sup>

Bernstein handed out proposals relating to uniforms (Article 16), job postings and filling vacancies. He requested a written counter to the Hospital’s discipline proposal (Article 22) and the parties resumed bargaining over Articles 1 (recognition) and 26 (classifications).

#### 7. The March 28 and 29, 2017 Bargaining Sessions

At the March 28 and 29, 2017 sessions, the Hospital tendered counterproposals on discipline and job postings, and the parties reached tentative agreements on uniforms. Bernstein also introduced four proposals: a counterproposal for managerial duties and rights, a new proposal for union security (Article 2), grievance and mediation (Article 18) and no-strikes or lockouts (Article 21).<sup>26</sup>

The Hospital’s March 28 management rights proposal countered the Union’s February 1 proposal. However, it was virtually identical to the Hospital’s December 6 proposal, with the exception that the Hospital agreed “to receive from the Union constructive suggestions, which the Hospital shall consider in its sole discretion.”<sup>27</sup> Godoff, hardly impressed, told Bernstein to “Get the fuck out of here. Put it in the bargaining notes keep going with your proposal.”<sup>28</sup>

Three new Hospital proposals were tendered on March 29. Its union security proposal sought to delete that provision, as well as the dues remittance authorization.<sup>29</sup> That proposal was not discussed. However, the no-strike proposal, which would have precluded picketing and the use of “economic weapons” in response to contract violations or violation of federal law, evoked a strong response from Godoff:

<sup>21</sup> GC Exh. 5.

<sup>22</sup> GC Exh. 6; R. Exh. 2.

<sup>23</sup> GC Exh. 7.

<sup>24</sup> GC Exh. 8.

<sup>25</sup> R. Exh. 3 at 149–152.

<sup>26</sup> GC Exh. 9–12; R. Exh. 1 at 3601–3603, 3610–3611, 3614, 3627–3630.

<sup>27</sup> Schmid’s testimony confirmed that the Hospital’s proposal did not change from its December 6 proposal. (Tr. 248.)

<sup>28</sup> Contrary to the Hospital’s representation in the bargaining brief that followed, Godoff’s vulgar reference was obviously a rejection of the proposal and not a directive to Bernstein to leave. (Tr. 168.)

<sup>29</sup> R. Exh. 1 3598–3600.

Want to be clear at this point. We'll take a look at this document; not sure if we are prepared to bargain. Now into the end of March after months of negotiations on innumerable contract provisions that have taken a tremendous amount of time to go through and only TA<sup>30</sup> 1 or 2 of those documents. To submit on 3/29 a brand (sic) document that requires more time and effort. These negotiations have been extremely protracted and we have only 2 days and now into May before we're (sic) even able to consider language non-economic matters. Make clear now that we fully expect on the 6th of April to present economic proposals and begin to bargain over them. Not walking away from stuff we bargaining but will tell you under no circumstance not accept any new proposals into April, not accepted at that point. Again I don't know, it may simply clarify responsibilities, we can't make this a forever negotiation and have to hear from you on issues on retroactivity on wage increases before going into 5–6 months on a contract that's been around for 20 years or more. Reinventing a brand new contract with less than 1 arbitration a year; never been any job action in 20 years so there's nothing I see in the present contract that has been problematic for either party. No complaints from mgmt., they have been 3 day off. [No]w talking 5 months at a minimum. That's where we are. Want to make sure we are bargaining toward a contract not spinning wheels. People not had a raise, contract already 3 months old. Serious concern of ours, not making progressing fast enough, think we ought to lock in dates in [M]ay so we can at least make sure we are done by May. Concern [we'll] be here.<sup>31</sup>

Bernstein agreed to schedule bargaining dates for May but insisted the parties bargain over the new proposals, insisting they were all urgent. In response to Schmid's comment that the Union had not fully responded to the Hospital's proposals, Godoff replied:

You're full of shit . . . we've given you everything. You don't know what the hell is going on. By sticking out month after month these people are going without a raise. Paying without 12 an hour. She pisses me off and you ruin these negotiations.<sup>32</sup>

After a brief exchange, Bernstein asked if it was the Union's position that it would no longer discuss non-economic proposals. Godoff replied:

Reaching point you are not bargaining in good faith, becoming the suspicion. Not agreed on employee wants to look at personnel file for a union rep to help them go through the file. What's happening is people are becoming concerned, this is a continuing, [we're] going to get [to] new. We're not into [M]ay. Takes us hours to go through non-economic.

The Hospital's negotiators then noted the need to tighten or

clarify language because numerous contract interpretation issues had arisen over the years. Godoff replied:

We've all been in negotiations; there have been issues with management and union about interpretation. For [management] to come and change and clarify position but to come in and say on provisions never been a dispute and spend hours and hours raises red flag for the union. What you're doing is dragging out a process with no intention on getting to a process in the end. If we're going to have a fight not sure if we want to wait to have a fight. I'll be candid, with certain exceptions members of your committee, really did want to get to a contract and I've assured the union this is difficult and time consuming but intentions are honest. Also some that raises a red flag. After months of negotiations new proposal on a strike clause with no labor dispute in 20 years, never had a picket line, never had anything but health positive labor mgmt. relations. Why all of a sudden is the no strike clause a significant concern that would postpone a raise, for wages by July below minimum wage for DC? We're concerned about that.<sup>33</sup>

As bargaining continued, Bernstein tendered a proposal to replace Article 18 (grievance and arbitration) with a grievance and non-binding mediation provision, and amended its previous disciplinary proposal. The proposal curtailed the Union's ability to file lawsuits alleging violations of the CBA unless the breach involved a provision subject to mediation. Construed in conjunction with the disciplinary proposal, the proposed process essentially relegated discipline short of discharge to the grievance process and foreclosed access to mediation and further litigation. Godoff took exception, noting that "[t]his is potentially goodbye to this session. We won't have time to read through this today."

Bernstein then distributed a proposal to replace Article 3 (dues check-off). Godoff replied that "[t]his is bullshit . . . Come on [give] us the other things. [We're] out of here." As the Union negotiators were leaving, Godoff said that they would take the rest of the afternoon to "look at what you gave us."<sup>34</sup>

This was a pivotal development in the negotiations, as the proposals stymied the Union's objective of advancing to bargaining over economic terms. In fact, Godoff advised the Union's bargaining team after this session that the proposals were "a clear announcement by management that they would never enter into an agreement with [the Union]."<sup>35</sup>

The Hospital's March 30, 2017 bargaining brief focused on the more raucous aspects of the March 28–29 sessions and completely omitted any reference to the concessions made by the Union in its February 1 counterproposal on management rights, as well as the Hospital's refusal to change its position between December 6 and March 29.<sup>36</sup> In addition, the brief highlighted the Union's refusal to "allow supervisory employees to perform bargaining unit work. We don't see how that helps staff members

<sup>30</sup> TA is shorthand for tentative agreement.

<sup>31</sup> R. Exh. 3 at 175–176.

<sup>32</sup> Godoff conceded that he lost his temper at this particular session and "threw [Hospital's counsel] out of the room." (Tr. 51–52). After that session, Godoff told the Union "that in my view you are never going to get a contract." (Tr. 124.)

<sup>33</sup> R. Exh. 3 at 175–178.

<sup>34</sup> R. Exh. 3 at 179–180.

<sup>35</sup> Godoff's testimony that the Union asserted on March 29 that the proposals would remove the Union's ability to enforce employees' rights was not reflected in the bargaining notes. (Tr. 51, 126). He did contend at that time, however, that the proposals were not justified based on the excellent labor relations history between the parties—no strikes or labor disputes, with the exception of one arbitration proceeding—during the past 20 years. (R. Exh. 3 at 176–178, 185.)

<sup>36</sup> GC Exh, 13.



who would like to be able to rely on their directors' managers' and supervisors' help when facing a difficult task or call-outs[.]” The brief also stated that the “union’s negotiator was dismissive of the Hospital’s March 28 proposal and told the Hospital they needed to ‘Get the F\*\*\* Out!! and that they would not be willing to consider further Hospital proposals on the subject.” The remainder of the brief was also critical of the Union’s conduct:

As the Hospital’s VP of Labor Relations [Ms. Schmid] attempted to explain the Hospital’s position, the union’s attorney [Mr. Godoff] cut her off before shouting, “She pisses me off!” Then, turning directly to her he added, “You’ve ruined these negotiations!” The Hospital’s VP of Labor Relations replied, “You don’t intimidate me.” At that point the attorney said, “If I wanted to intimidate you, I could have.”

Mr. Andrews then chimed in by repeating the lawyer’s statement that, “This is bullshit!” The Hospital’s chief negotiator [Mr. Bernstein] replied, “Just so I capture that clearly, is ‘bullshit’ one word or two?” In the presence of the entire room, including several female members of both committees, Mr. Andrews (who was apparently sitting in for the union’s lead negotiator), replied, “There are three things that I don’t tolerate—Bullshit, Bigotry, and Bitches.” Many participants were disgusted by that remark which seemed to be directed at a number of people in the room.

The Hospital’s negotiator made one more effort to redirect the union’s attorney to the Hospital’s proposals, only to have him respond, “Kiss my ass!” Mr. Andrews added, “Capture that!” Unfortunately, the meeting adjourned on that note at 1:00pm, with the union’s attorney making clear that he was unwilling to continue the meeting or return to the negotiating room despite the fact that negotiations were scheduled to continue for the balance of the afternoon.

#### 8. The April 5 and 6, 2017 Bargaining Sessions

After Bernstein opened the April 5, 2017 bargaining session by proposing to go resume bargaining over the Hospital’s March 29 proposals, Godoff stated that the Union no longer believed that the Hospital was interested in reaching an agreement but would continue to bargain in good faith.<sup>37</sup> Bargaining proceeded with the Hospital’s presentation of a counterproposal on discipline in which it agreed to timely notify employees.<sup>38</sup> The Union noted several discrepancies in the proposal with respect to arbitration versus the mediation of grievances as it was presented by the Hospital on March 29. The Union also orally countered by proposing that the longstanding grievance and arbitration procedure remain unchanged.<sup>39</sup> The Hospital did not budge on this issue, attributing the justification for the procedural change to a previous arbitration ruling. Nor did Bernstein attempt to reconcile the noted discrepancies at this meeting.

The Hospital presented its last noneconomic proposal at this session—the replacement of the safety clause (Article 20) with a

safe harbor for safety concerns provision.<sup>40</sup> Once again, Godoff responded crudely, “Do you guys give a shit? It’s a disgusting proposal,” and when Bernstein suggested the Union put more time in countering instead of critiquing, Godoff replied, “Here’s the counter—no.”<sup>41</sup>

At the April 6, 2017 bargaining session, the Union countered with a rejection of the Hospital’s proposals to delete the union security and dues check-off provisions.<sup>42</sup> It then presented its initial wage proposal—a five percent increase for all unit employees—consistent with the amounts in the expired CBA.<sup>43</sup>

In the bargaining brief that followed, the Hospital reported that the parties had reached tentative agreement on two proposals—the preamble and uniforms. The Hospital also continued its pattern of reporting on the bargaining derelictions of the Union negotiators: their arrival to bargaining 2 hours late and then bargaining for about four of the scheduled 12 hours; and failure to provide the Hospital with responses to 13 proposals while the Hospital needed to respond to three proposals. The Hospital also claimed that its objection to the union security clause was based on its belief “that employees should have a choice as to whether or not to pay union dues, and should not be fired, as the union is insisting, if they choose not to pay dues.”<sup>44</sup>

#### 9. The May 16, 2017 Bargaining Session

The parties started the May 16, 2017 session by reviewing the Union’s most recent proposals relating to recognition and classification, restricted access, attendance policy, seniority layoff, union presence during employees’ reviews of personnel files, non-discrimination and no-striking. In particular, Godoff asserted that Bernstein’s combined proposals for a no-strike clause, very broad management rights and non-binding labor arbitration constituted unfair labor practices. Bernstein simply plowed ahead with the next item on the list, grievance and mediation. He also brought up pending proposals relating to Articles 2, 24 and 25 on the solicitation and distribution of literature, bulletin boards and discipline. Finally, Bernstein stated that he would be tendering a proposal to amend Article 6 (hours for employees), which the Hospital viewed as an economic item.<sup>45</sup> Godoff replied that Bernstein could send the proposals but the Union was not going to agree, adding that the parties had been bargaining for 6 months and the Union was no longer accepting new noneconomic proposals.

Bernstein tendered the new proposals and Godoff replied that there were 20 noneconomic provisions in the expired CBA and the Hospital had proposed to completely overhaul 19 of them. He added that the CBA language had been in effect for decades and the Hospital insisted on renegotiating every provision. As examples, he referred to Bernstein’s insistence on revising the arbitration process when there had been a lack of arbitration, insistence on bargaining over layoff language when there had not been any layoffs, and bargaining over strike language when there had never been a picket line. Schmid insisted that the contract language was out of date. Godoff replied that parties normally

<sup>37</sup> R. Exh. 3 at 181.

<sup>38</sup> GC Exh. 14.

<sup>39</sup> R. Exh. 3 at 181–203.

<sup>40</sup> R. Exh. 3 at 193–195.

<sup>41</sup> R. Exh. 1 at 3617–3618; R. Exh. 3 at 193–195.

<sup>42</sup> R. Exh. 2 at 3771.

<sup>43</sup> R. Exh. 2 at 3780–3782.

<sup>44</sup> GC Exh. 16.

<sup>45</sup> Ultimately, the Hospital never proposed such a policy. (Tr. 85–86; R. Exh. 3 at 222.)

negotiate when they are having difficulties with provisions they are working on and asked Bernstein to point to issues with any of the provisions.

Godoff mentioned that before concluding for the day, the Union wanted to add to its economic proposal and start discussing it. Bernstein replied that the Hospital did not want to move forward on economic issues because many noneconomic items were still pending. There was brief discussion over pay increases relating to specific job classifications before the parties broke for lunch. When they resumed, the parties bargained over recognition and classification, attendance and absence, union activity/visitation and discipline.<sup>46</sup>

#### 10. The Hospital's May 25, 2017 Revised Disciplinary Proposal

On May 25, 2017, Bernstein emailed Godoff a revised version of the Hospital's disciplinary and grievance-mediation proposals:

Good afternoon Steve, I hope that all is well with you. My apologies for the delay, but per our discussion at the bargaining table this past week, I've gone ahead and attached Hospital proposals pertaining to both Discipline and Grievance and Mediation, which have been revised in an effort to reconcile some of the discrepancies that you had pointed out in prior sessions. For ease of convenience, I chose to highlight the substantive changes in the Discipline proposal to distinguish them from the other revisions reflected in show changes mode. As always, please do not hesitate to call with any questions. In the meantime, I look forward to seeing you and your team next month. Thanks.<sup>47</sup>

#### 11. The June 12, 2017 Bargaining Session

The June 12, 2017 session opened with argument over the Hospital's continued refusal to pay employees on the bargaining committee for time spent in bargaining and their need to use paid time off to attend. Godoff noted that the Union agreed to have employee negotiators attend during scheduled days off on the assumption that bargaining would last a few sessions. He added that "the way you have bargained have led us into a lengthy process." Bernstein explained that his travel commitments precluded him from working past 6 p.m. and required that the next day's bargaining session be cancelled. Godoff replied that the Hospital still had not provided any response to its economic proposals, the parties had not been making any progress toward an agreement, and the employees had been working for months without a pay increase. Bernstein acknowledged receipt of the Union's most recent economic proposals, including a five percent pay increase shortly before the meeting and then passed out its proposal. The parties, however, spent the rest of the session updating a list of employees and their classifications.<sup>48</sup>

#### 12. The July 12, 2017 Bargaining Session

After reviewing the Hospital's previous revisions to its arbitration and discipline proposals, the parties started the July 12, 2017 session with a discussion of the Hospital's spreadsheet of

employees and issues with the incorrect wage rates paid to certain unit employees. After a lunch break, Bernstein asked for more time to review the Union's economic proposal and turned the focus to the Hospital's revised discipline and grievance proposals, which changed "documented" to "verbal" and "arbitration" to "mediation." Bernstein also said he was waiting for a counter to the Hospital's proposed changes to recognition and classification and management rights. He then discussed the job postings proposal that the parties were close to agreeing on. Godoff said the Union would consider it.

Bernstein acknowledged that the Hospital owed a proposal on safe harbor and then referred to its November 21 proposals and the Union's December 6 counterproposal on recognition and classification. The parties were apart on the Hospital's proposal to exclude crew leaders but agreed to other proposals. Bernstein then moved to probationary employees, proposing a 90-day probationary period, while the Union proposed 60 days with a potential 30-day extension. Discussion ensued regarding per diem, temporary and agency employees.<sup>49</sup>

#### 13. The July 31, 2017 Bargaining Session

Bernstein opened the July 31, 2017 session by reporting that the Hospital was still processing employees' names to ensure compliance with the expired CBA. He then proposed bargaining over the recognition and classification issues, and the Union's December 6 counterproposal. The only issue there remained crew leaders. Godoff emphasized the Union's opposition to any proposal that would modify the definition of a full-time employee from 40 to 32 hours. Bernstein replied that such a change would have the effect of adding a lot more union dues payers. With respect to the parties' probationary period proposals, he said there was room for compromise. The Union proposed to agree to the Hospital's job postings proposal if the Hospital agreed to Union's last proposal regarding employee requests for a union representative and non-discrimination. Bernstein said the Hospital would consider it.<sup>50</sup>

After a break, the Union proposed to eliminate a contract provision entitling any person working over 35 hours per week to receive an additional 30 cents per hour. Bernstein characterized that as an economic item and deflected to the issue of crew leaders. He asserted that there was no classification for crew leaders and referred to them as lead employees. Godoff replied that crew leaders were non-supervisory and should be in the unit.

After another break, Godoff brought up discipline and insisted that the Union would not agree to a contract that did not provide just cause for disciplinary or provide for arbitration. He also requested a counterproposal with respect to the length of time for notices of discharge. The meeting ended with the Union's resistance to the Hospital's proposal to replace Article 25 (union announcements and conferences). Before concluding, the parties agreed to resume bargaining on September 7 and 8.<sup>51</sup>

#### 14. The October 6, 2017 Bargaining Session

The October 6, 2017 session began with Bernstein proposing that the parties discuss wages. Godoff requested information for

<sup>46</sup> R. Exh. 3 at 220–225.

<sup>47</sup> GC Exh. 17.

<sup>48</sup> R. Exh. 3 at 231–237.

<sup>49</sup> R. Exh. 3 at 238–254.

<sup>50</sup> R. Exh. 2 at 3805–3807, R. Exh. 3 at 255–257.

<sup>51</sup> R. Exh. 3 at 255–262.

the previous six months of hours worked. Then there was discussion over the applicable wage rate, with Bernstein focusing on the “practice” rate and Godoff noting that the contract rate was applicable and that the time taking to get a handle on underpayment was for naught. He insisted that the printout demonstrated that employees were not being paid at the contract rates. After a 1-hour break, Bernstein agreed to have the Hospital look at the list again.

After an hour and a half lunch break, the Hospital maintained its position on whether a union representative could be present during review of a personnel file. Godoff said that the Hospital’s refusal to move on non-discrimination constituted an unfair labor practice. Bernstein moved to the crew leader issue which remained in dispute. Regarding probationary periods, Godoff proposed 60 days with an additional 30 days if a manager needed more time to assess employee performance. The Union remained opposed to the Hospital’s proposal to allow it to reduce full time employees’ hours from 40 to 32 per week. Bernstein replied that the current language eroded the Hospital’s rights under the management rights clause. Lisa Brown noted that this was the same conversation that the parties had months earlier. Bernstein replied that there had been “movement on other things on both sides.” After Schmid asserted that the “vast majority of lack of counters has come from the other side of the table,” Brown referred to the two economic proposals tendered by the Union. After Godoff insisted the only sticking point was the Union’s insistence on allowing employees to have Union representatives present when they look at their files, Bernstein replied: “By my counts the employer has submitted 19 proposals, the union has submitted 19 proposals the ball is in the [Union’s] court on some and it’s in ours on some and my sense is that we’re getting close to final statements.”

The discussion then moved to per diem employees converting to full time if they work 60 straight days. As the discussion continued, the Union raised issues over employee training by other employees instead of supervisors. If that was going to continue to happen, however, the Union believed that employee trainers should at least be compensated. The Union also asked for an explanation as to why non-unit personnel were receiving a transportation benefit, but unit employees were not.

Toward the end of the session, Bernstein asked if the Union had heard anything to that point that would alter its initial wage proposal in advance of the Hospital’s initial wage proposal. Bernstein said, “I think your proposal is pretty straightforward just a straight bump, I just want to be sure you’re not going to change it.” After Godoff explained stated the reasons behind the Union’s wage proposal, Bernstein said “it shouldn’t surprise anyone that we’re going to propose a new [structure].” Godoff conceded that the previous wage scheme was problematic because of discrepancies among departments, to which Bernstein replied, “I think we all owe it to whomever comes after us to be clear and make it easier to figure out.” The meeting ended without an agreed upon resumption date.<sup>52</sup>

#### 15. The January 17, 2018 Bargaining Session

Esders replaced Godoff, who recently underwent surgery, at

the January 17, 2018 bargaining session. Bernstein reported that the Hospital had not yet paid any of the back wages owed unit employees. However, he did provide a revised spreadsheet previously sent to Godoff listing the back wages owed.

Bernstein proposed in writing a notice of dues checkoff going forward and the Hospital’s intention to suspend dues checkoff effective February 1, 2018. He stressed that the Hospital’s position was not negotiable: “Union can secure from other means.” Esders replied that the Hospital was refusing to bargain over this implementation for the reasons stated in its letter. Bernstein confirmed that assertion.

Bernstein then summarized where the proposals stood up to that point. After a brief break, Bernstein proposed starting with the recognition clause. There was discussion of the minimum number of hours for full-time versus part-time, as well as per diem, temporary and agency employees. The Hospital proposed that part-timers stay at 20 hours per week. There was renewed discussion over the Hospital’s request to eliminate the crew leader position, which led to the Union renewing its assertion that some performed supervisory duties but did not get compensated. As for the applicable probationary period, the Hospital did not budge from its position of 90 days, while the Union continued to push for 60 days plus an additional 30.

After a nearly 3-hour break, Esders charged that the Hospital engaged in unfair labor practices during the morning session, while Bernstein tried to restart the discussion of the dues check off notice. However, Esders commented that discussions were breaking down and the Union walked out at 3:18 p.m.<sup>53</sup>

#### 16. The February 13, 2018 Bargaining Session

The February 13, 2018 bargaining session had numerous caucusing breaks. Bargaining started with discussion of a spreadsheet analysis of employees’ wages in attempting to determine the underpayment amounts, as well as negotiating over the applicable interest rate. The Hospital agreed to forego repayment of overpayments. The parties broke after an hour, resumed an hour later with continued discussion and broke for lunch 10 minutes later at 12:45 p.m. with no agreement reached on repayment.

The parties resumed at 3:17 p.m. and continued discussion of repayment issues. They broke at 3:35 p.m. When they resumed at 4:01 p.m., the Union agreed to the repayment of identified underpayments with interest at the Hospital’s proposed 4 percent rate—all contingent on a final agreement. Bernstein wanted to have the issue fully resolved on behalf of all unit employees, while Esders wanted to reserve their individual rights to arbitrate. They broke at 4:10 and resumed at 4:29 p.m. There was still disagreement on the 90-day timeframe for challenges to the repayment amounts. The Union offered to reduce that to 60 days. They broke at 4:37 and resumed at 4:45 p.m. at which time Bernstein countered with a demand that underpayment claims be resolved at bargaining. They broke at 4:49 and resumed at 4:56 p.m. The Union remained steadfast in its demand for employees to have recourse and the focus turned to the scheduling of 30-minute sessions on February 27 for each employee to meet with

<sup>52</sup> R. Exh. 3 at 263–275.

<sup>53</sup> R. Exh. 3 at 276–285.

management regarding their specific underpayment claims. The meeting adjourned at 5:36 p.m. with no future date set.<sup>54</sup>

#### 17. The May 18 and 21, 2018 Bargaining Sessions

The Hospital finally presented a wage proposal at the May 18, 2018 bargaining session.<sup>55</sup> The proposal included shift differential changes, and lump sum bonuses for quality performance and high attendance that were agreeable to the Union. The salary structure, however, was dissimilar to any of the wage components in the previous agreements between the parties.<sup>56</sup> It provided for a new compensation structure starting August 2019 that incorporated a market-based adjustment for each employee and merit wage increases for employees the Hospital deemed worthy. The proposal also based wage rates on employees' overall experience and not solely on their tenure with the Hospital. In addition, the Hospital retained sole discretion for evaluating employees, and its decisions would not be subject to the grievance process; if a review resulted in termination, however, the employee could grieve or mediate the decision.<sup>57</sup>

When the parties returned to bargain on May 21, 2018, Godoff asked for Appendix B to the Hospital's wage proposal. Bernstein replied that it would be provided in the afternoon. Upon being provided with Appendix B, Godoff explained that he was unable to evaluate the proposal because it lacked specificity as to the overall range for the various classifications. It provided only the lowest and highest rates for each classification with no indication as to the specific wage rate for each unit employee. He requested further documentation in that regard, but Schmid insisted that she could only give "examples" based on her "knowledge of the market" for specific classifications.

The Union opposed to this proposal on several grounds: the delayed raises, the use of performance evaluations upon which to base merit-based increases starting August 2019, and the timeline and calculation of market-based increases. When Godoff expressed concern "that these employees haven't had a raise since January 2015," Bernstein replied, "Yes, it's an unfortunate side effect to bargaining." Bernstein and Schmid told the Union that this proposal was not negotiable. When Godoff asked whether the Hospital was going to at least negotiate the ranges from year to year, Schmid said, "No, the ranges are set for the hospital as a whole, it will be the same range for nonunion employees and applied exactly the same way, people are going to be rewarded based on their individual merit." The Hospital's representations were consistent with the proposal's language that "[t]he evaluation process and merit increase awards for bargaining unit employees shall follow and be incorporated into the same general merit criteria and process used for all non-bargaining unit employees at the Hospital."<sup>58</sup>

The Union countered the Hospital's wage proposal by proposing the guarantee of merit increases based on performance evaluations where employees meet expectations or higher, but the

Hospital rejected that proposal. The Hospital countered with a second wage proposal, but the Union found no substantial concessions in the document.<sup>59</sup>

On May 21, 2018, the Hospital issued a bargaining brief blaming the Union for shortening the March 18 meeting when its bargaining team left because the Company had not returned from the lunch break by 1:50 p.m., insisting that it previously told the Union that the Hospital's negotiators had a telephone call at 1:30 p.m.

On June 7, 2018, Mr. Bernstein emailed the Union confirming that the Hospital was withdrawing its no-strike proposal and reinstating its proposal from March 29, 2017.<sup>60</sup>

#### 18. The July 31, 2018 Bargaining Session

Bernstein started the July 31, 2018 session by reviewing the outstanding proposals and Lisa Brown asked Bernstein if he had the "back wage proposal that we asked for 4 times, that you said you would have prior to this session?" Bernstein replied that he still did not have the information because of a change in personnel requiring that the Hospital "redo some of that work." When asked by Brown as to how that changed the data, Bernstein clarified that it "changed the progress we were making on that data. Pressed by Brown for a date, Bernstein did not know. Godoff said that was "unacceptable performance on your part, it's been 3 or 4 months." Brown said the Union gave the Hospital a formula with the accurate calculations at the last session and it seemed like the Hospital was dragging out the back-wage issue. Bernstein replied that the change in personnel changed the progress that the Hospital was making in compiling the data. Brown asked for a date that the information would be provided by. Bernstein did not know and changed the subject to the Union's last proposal.

After a lunch break, Brown asked Bernstein to discuss the Hospital's wage proposal information in Appendix B. He explained the pay ranges, which were based on years of experience for new hires. As the discussion progressed, Brown and Schmid disagreed on the Hospital's proposal to link future pay increases to merit or performance. Schmid argued that high performing employees were not being recognized under the current pay system, while Brown replied that the Hospital could always pay them more, and that workers doing the same work should receive the same pay, and the employer has disciplinary alternatives available to them for unsatisfactory work. Bernstein remarked that there were several open proposals. Brown replied that the Hospital needed to agree to more than the 2 days previously agreed to (September 5 and 6).

At the conclusion of that discussion, Bernstein commented that the parties "made good progress today," but Schmid started an argument over whether the Union had countered any of the Hospital's proposals. Bernstein mentioned fifteen Hospital proposals that had not drawn a counterproposal and two Union

<sup>54</sup> R. Exh. 3 at 286–300.

<sup>55</sup> The proposal referenced specific wage ranges in Appendix B, which was not provided at that time. (GC Exh. 18; R. Exh. 1 at 3640–3643.)

<sup>56</sup> This finding is based on the credible and undisputed testimony of Godoff, Schmid and Bernstein. (Tr. 60–62, 203–205, 580–582.)

<sup>57</sup> The parties took a lunch break at 12:22 p.m. with the Union negotiators expecting that the Hospital's negotiators would be right back.

When they took longer than expected the Union warned that they would leave if the Hospital's negotiators did not return by 1:50 p.m. They did not return by that time and the Union negotiators left. (GC Exh. 18; R. Exh. 3 at 301–304.)

<sup>58</sup> R. Exh. 3 at 305–310.

<sup>59</sup> GC Exh. 19.

<sup>60</sup> GC Exh. 21; R. Exh. 1 at 3655–3658.

proposals that the Hospital had not countered. Lisa Brown replied that the back-wage issue needed to be resolved before moving on to other issues. Schmid disputed that assertion but they both agreed that the back wages needed to be resolved and an economic proposal from the Hospital if the non-economic issues were not resolved. Schmid disputed that assertion and Bernstein noted that the parties had never agreed to ground rules. Brown urged that the parties move quicker and stated that if the parties did not get the non-economics resolved, the Union would come back with a package, but needed the documents on back wages and the Hospital's economic proposal. After an explanation by Bernstein of what was not countered by the Union, Godoff remarked that the Hospital had moved away from the contract that was in place for 20 years. Brown added that the Hospital took an aggressive nonunion position and there were not enough days scheduled to move bargaining forward. She added that a month in between meetings disrupted any flow that might have been generated from previous meetings.<sup>61</sup>

#### 19. The August 1, 2018 Bargaining Session

At the August 1, 2018 session, Bernstein acknowledged receiving the Union's counterproposal the previous day relating to availability of service (absences in excess of 3 days) and referred to the applicability of FMLA guidelines and extended leave banks. They also discussed clocking in procedures. Bernstein then proposed a disciplinary schedule of up to 24 months. The Union broke to consider the proposal and the Hospital needed additional time to meet with the payroll department to review the back-wage data.

When they resumed 2 hours later, the Union raised questions about emergency situations excusing justifiable lateness and absences and agreed to submit a counterproposal. The discussion then turned to the Hospital's proposal to reduce official time for grievances from 1 hour per week per delegate to a total of 300 hours per year.

The Hospital's yearly break-down of the market-wage rate proposal reflected an increase in base pay to \$13.75 and a range of pay based on experience increased by a minimum of 2 percent, but was contingent on the Union agreeing to a performance merit system. Godoff said the Union would have to review the data. Bernstein also acknowledged that employees needed to be made whole for back wages.

The parties then haggled over the Hospital's proposed merit increases starting in 2021. The meeting ended with Godoff acknowledging that the Union owed a counter on availability of service. The parties concluded with a discussion of available dates in September.<sup>62</sup>

After the session, the Hospital issued a bargaining brief blaming the Union for still not having responded to 15 hospital proposals, wasting time by switching negotiators at the bargaining table, and criticized the Union for rejecting the hospital's merit pay proposal:

The union made it clear that "the union does not agree to merit pay." When asked shouldn't it be the employees who decide

whether they want merit pay increases, the union said, "not every decision has to go to the members, in here [the bargaining team] – a this is the union."

The Brief concluded with a summary of the Hospital's merit wage proposal and criticism of the Union's position as inimical to the notion of rewarding "good performers."<sup>63</sup>

#### 20. The September 5 and 6, 2018 Bargaining Sessions

At the September 5 session, the Union provided several counter proposals. The Union agreed to the Hospital's April 5 proposal to delete Article 24. The Union provided written counter proposals to the Hospital's March 28–29 proposals regarding Article 18 (grievance procedures),<sup>64</sup> Article 2 (union security),<sup>65</sup> Article 3 (dues check off), and Article 30 (management rights).<sup>66</sup>

Bernstein summarized the outstanding proposals. The Hospital had not yet countered the Union's visitation proposal, but Bernstein noted that the Hospital had a competing proposal from November 22, 2016. With respect to the Union's safe harbor proposal of April 6 and 7, the Hospital submitted a counterproposal. Others outstanding proposals included Hospital proposals to supplement the integration clause (Article 29), seniority layoff and recall, solicitation and distribution, and personnel files revision of Article 28. The parties were also apart on management rights, grievances, dues check off, union security and non-discrimination, discipline, recognition and classification, and wages. Bernstein added that the parties were confirmed for further bargaining on October 31 and November 1.

Esders began discussion of backpay and the back-wage spreadsheet. The Union disagreed with the Hospital's proposed four percent interest rate. The Hospital tendered its safe harbor proposal again, which it said was the last noneconomic item on its list.

After an hour break, the Union countered by rejecting a portion of the safe harbor proposal and proposing minor language changes. The Union then moved to the backpay spreadsheet. Esders noted, however, that the information was incomplete, and the Union needed specific amounts to be inserted and would then need to review that information.

Bernstein discussed into the four Union proposals. With respect to the management rights and dues check off proposals, Bernstein said they were substantially different from the CBA and asked where they came from. He added that there had been no counter to the Hospital's wage proposal. After the lunch break, Esders explained that the revised proposals were from other agreements. The union security proposal was copied from the Union's agreement with a Boston hospital owned and managed by UHS; the management rights, grievance and arbitration proposals were copied from agreements between the Union and a group of New York hospitals. The Hospital negotiators took issue with those proposals and Esders agreed that they needed revision.

The parties tentatively agreed to the Hospital's nondiscrimination proposal. Other proposals tentatively agreed to included job postings, uniforms and the preamble. The parties also agreed

<sup>61</sup> R. Exh. 3 at 326–345.

<sup>62</sup> R. Exh. 3 at 346–354.

<sup>63</sup> GC Exh. 22.

<sup>64</sup> GC Exh. 23; R. Exh. 2 at 3813–3815.

<sup>65</sup> GC Exh. 24; R. Exh. 2 at 3818.

<sup>66</sup> GC Exh. 25; R. Exh. 2 at 3816.

to compromise language replacing Article 25 (union announcements). With respect to the Hospital's May 2018 recognition and classification proposals, the Union argued in favor of keeping the crew leader classification because the position still existed. The Hospital pushed for a 90-day probationary period and the Union countered with a proposal that any extension beyond 90 days required Union consent. The Hospital countered the personnel files proposal (Article 28) by proposing that any Union representative present be limited to an "internal union delegate." Schmid reiterated the Hospital's counterproposal to eliminate the Union security clause. The Union insisted that the backpay issue be resolved instantly, but Bernstein disagreed. Schmid again conceded the wage underpayments and Bernstein said that the Hospital wanted to make unit employees whole but wanted to ensure that it was done correctly.<sup>67</sup>

At the September 6 session, Bernstein went through five tentative agreements—the preamble, uniforms, job postings, non-discrimination and deletion of Article 24 (union-management conferences). Outstanding were Hospital proposals regarding restricted access, layoff and recall, solicitation and distribution and management rights. Argument ensued when Godoff said that the Union accepted the Hospital's solicitation and distribution proposal with the exception of one word. Schmid insisted that the Union put that in writing so the changes could be tracked. Godoff pushed back, maintaining that there was nothing to track since the Union essentially agreed to the proposal.

Contentious discussion ensued regarding the Hospital's safe harbor proposal with Godoff insisting that the section simply mirror OSHA protections while Schmid maintained that it was the employee's decision. Godoff took exception, asking "what is the problem with stating what the federal protection (sic) are, you have to post the fucking thing in your building anyways (sic) you're proposing to put in a contract that that this is an agreement they no longer have their rights under federal law." Schmid disagreed.

The parties discussed the Union's grievance and arbitration counterproposals but did not reach an agreement. With respect to the Union security proposal from the day before, the Hospital wanted to keep it at 60 days, while the Union still proposed 30 days. Godoff also asserted that the Hospital's continued insistence on "language to do away with forced dues" was unacceptable.

After a lunch break, the parties bargained over the dues check off proposal. Schmid repeated the Hospital's desire to eliminate forced dues check off. She then added that "it's also an issue for us that we don't want it" and "it's not fair to force employees to pay dues to keep their jobs at [the Hospital]." Godoff replied that employees made that decision when they voted in favor of union representation. Schmid replied, "Decades ago." After Schmid added that the Union has never given unit employees the choice of whether or not to pay dues, Godoff replied that Schmid "[did] not understand how it works." Wallace then implied that Hospital pushed for decertification. Godoff followed with a remark that the Hospital did not like unions. Bernstein replied that "[w]e do like choice." After noting that the Hospital had discontinued dues check off deductions, Schmid attributed it to the fact

that the CBA expired.

There was further discussion over the Hospital's management rights and solicitation and distribution proposals. In addition, the Hospital proposed a different approach to educational benefits and training. The Union agreed to review that proposal and the session ended.

The September 7, 2018 bargaining brief following those sessions was entitled, **"We are going to have blacken your name - the name of this institution - SEIU Negotiator, threatening that the union will damage the reputation of the Hospital because the Hospital has proposed giving employees CHOICE about whether they wish to pay dues to the union."** (emphasis in original) The brief criticized the Union latest proposals as emanated from "a very old contract involving hospitals and nursing homes in New York, with language dating back to 1968." The bargaining brief further stated that the proposals did not respond to any of the Hospital's proposals or reflect any of the Union's prior proposals and were not based on the current contract language. Those assertions then led into criticism of the Union's competency:

The Hospital, at this point, expressed frustration that nothing the union had put across the table showed ANY effort or work on the union's part for the employees who they say they represent. How, the hospital asked, could the union be so intent on forcing employees to pay dues when this was the kind of slipshod work the union continues to bring to the table. It seemed to be yet another union grab for money, with no effort being made on behalf of the employees. The Hospital directly asked the union whether it believed that employees should have the freedom to choose whether or not they want to pay dues to the union. The Hospital proposed that employees should NOT be forced to pay dues – they should have a choice. **The union told the Hospital, "you can stick those proposals up your ass."** The Union said they would never agree to allow employees to have that choice. In fact, the union said that employees already made their choice about dues – back at the time the union was voted in over 20 years ago. Seriously?? (emphasis in original)

The Hospital also questioned the union's misleading language which makes it appear that employees must be members of the union. The law says that no one can be forced to be a member of the union, (even though they may be forced to pay dues if the union negotiates a forced dues clause). The union did not want to change the language, even though they know it is misleading, saying "membership" does not mean "membership." That is completely nonsensical.

Instead, the union continued, accusing the Hospital of "hating the union" when all the Hospital was doing was fighting for the freedom for employees to choose dues and choose membership. When the Hospital wouldn't back down, the union then threatened to blacken the name of the Hospital – in the city and with the mayor. The Hospital asked how that would help GWUH employees? The union had no answer.

The bargaining brief further stated that the Hospital proposed

<sup>67</sup> R. Exh. 3 at 355–369.

giving tuition reimbursement to unit employees instead of contributing to the Union's "completely ineffective" education fund. It also criticized the Union for spending hours talking about "old, recycled proposals for nursing homes" that had no relevance to unit employees instead of discussing the Hospital's July 2018 wage proposal.<sup>68</sup>

#### 21. The October 10 and 11, 2018 Bargaining Sessions

At the October 10, 2018 session, the Hospital finally produced a completed backpay spreadsheet and stated its intention to issue payments to unit employees. Bernstein then went over a list of noneconomic items—bulletin board postings, union security, dues check off and grievances. The bulletin board issue was close to being resolved but culminated with an argument between Schmid, who insisted that the Hospital see fliers before they were posted to ensure they did not contain political statements, and Godoff's insistence that the Union was entitled to educate unit members on their right to vote.

After the lunch break, the parties discussed but still did not come to agreement on numerous noneconomic issues, including management rights, discipline, dispute resolution, union security, and employee's personnel file reviews in the presence of a Union representative. The discussion then moved to the Hospital's wage proposal. Schmid commented that the Union had not replied to the Hospital's wage proposal. Godoff replied that the Union's failure to respond to the wage proposal was due to the time wasted time bargaining on the noneconomic issues. At Godoff's request, Bernstein and Schmid explained again how the merit wage-based process was going to work. The Hospital's position was unchanged.<sup>69</sup>

At the October 11, 2018 session, the parties discussed proposals relating to the preamble, uniforms, job postings, bulletin board posting, nondiscrimination, union management conference and personnel files. They tentatively agreed to the personnel files proposal, but did not reach agreements on any of the other noneconomic issues. The parties then discussed the Hospital's wage proposal. Schmid explained that all employees would receive a wage increase of at least 2 percent immediately upon contract ratification.<sup>70</sup>

The Hospital's October 12, 2018 final bargaining brief was entitled, "Round 20 and still no decision. We aren't even close. Why?" After criticizing the Union's negotiators for wasting time, the brief described the Hospital's version of the bargaining over its wage proposal:

Most importantly, the Hospital informed the union that it has completed the dietary back-wage analysis. The Hospital provided the payout calculations and back up to the union. The Hospital let the union know that the Hospital plans to distribute the checks for these back wages to all affected employees, to make them whole, in a special payroll check to be run on Friday, October 19th.

After months of silence on the Hospital's wage proposal, the union finally asked for further information about it. The union could have had this information three months ago and they could have had a counter proposal ready to give the Hospital.

Instead, we have still not moved forward on wages because the union is just beginning to look at them. We advised the Union that, had they taken the time to review our wage proposal when we initially gave it to them FIVE months ago, then we would be much further along by this point.

The Hospital expressed concern to the union that there is a rumor circulating that the Hospital is not offering even a dollar per hour increase to employees after all this time. This is very far from the truth. **We showed the union that the Hospital's proposal would provide immediate increases upon ratification of the contract to all staff.** These increases in many cases are very significant and reflect what the Hospital believes to be competitive wages for our jobs here in D.C. (emphasis in original)

We explained to the union that –

#### Under the Hospital's proposal:

- EVERYONE would receive an increase immediately upon ratification of the contract;
- Many employees would see **significant increases** – the highest being a 33% increase, with many individuals' increases being in the double digits;
- The increases taken all together average approximately 9.7%;
- The least anyone would receive would be 2%, and most of the employees in this category are those who have been hired in the last year with little or no experience and who have not been waiting years for an increase;
- Additionally, the Hospital's proposal provides for an additional increase in 6 months (July 2019) based on merit, as well as additional lump sum bonuses based on department performance measures.

#### Under the Union's proposal:

- The vast majority of employees would receive less than a one dollar raise. Only those making \$20/hour or more would see a one dollar or more raise;
- The union's proposal does not provide for any reward for personal performance or for any bonuses. (emphasis in original)<sup>71</sup>

#### *D. Withdrawal of Recognition*

##### 1. Disaffection petition is circulated

Sometime in March 2018, EVS employee Eugene Smith began circulating a disaffection petition among other unit employees. While soliciting coworkers to sign the petition, Smith lauded Kim Russo, the Hospital's chief executive officer, and told them that they would get a pay raise and travel stipend if they got rid

<sup>68</sup> GC Exh. 26.

<sup>69</sup> R. Exh. 3 at 391–404.

<sup>70</sup> R. Exh. 3 at 405–412.

<sup>71</sup> GC Exh. 27.

of the Union.<sup>72</sup> Smith was assisted by another EVS employee, Hardie Cooper.<sup>73</sup>

Some individuals, like EVS probationary employee Angelica Claros, signed the petition because they did not want union representation. She had been employed for about three months at the time she signed the petition on October 12, 2018. At the time, she was approached by an unknown individual who told her “you are a new hire, yes. You don’t want a union.” She replied, “No, I don’t want it.” Claros was unaware up to that point that she was even represented by the Union.<sup>74</sup> Others, like EVS employee William Barnes, did not have a problem with the Union but he still signed the petition on April 5, 2018 and again on August 23, 2018.<sup>75</sup>

Most who signed the petition, however, did so because they were disappointed with the Union’s inability to get a new contract and the resulting wage increases. Freddie Ard, an EVS employee, signed the petition on April 2, 2018 because he wanted “to get a better benefit” and was concerned about his wage rate not increasing during bargaining.<sup>76</sup> Tsedale Benti, an EVS employee, signed the petition on April 25, 2018 had several concerns about the Union, including the fact that she had not received a raise.<sup>77</sup> Vivian Otchere, an EVS employee, signed the petition on June 22, 2018 after being told by an unknown individual that she might get a pay raise if she signed the petition.<sup>78</sup> Noel Reyes, a dietary employee, signed the petition on July 3, 2018 because the Union was unable to secure a contract and pay raise for the past 2 years.<sup>79</sup> Lewis Bellamy, an EVS employee, signed the petition on August 29, 2018 because the Union was not getting results from bargaining over 2 years, specifically pay raises.<sup>80</sup> Mary Collins, an EVS employee, signed the petition on

October 13, 2018 because the Union was unable to get a contract and a wage increase.<sup>81</sup>

Schmid was well aware of the petition by July 2018.<sup>82</sup> As of September 11, 2018, however, the petition had been signed by only one-third of the bargaining unit. A total of 37 signatures were from employees who were hired after the expiration of the previous contract. Over the next month, no employees signed the petition.<sup>83</sup> During the next 2 weeks following the Hospital’s issuance of the October 12, 2018 bargaining brief, which included the Hospital’s issuance of backpay checks to dietary employees seven days later, 27 more employees signed the petition. Of those 27 employees, 14 had been hired within the previous 2 months; six of those 14 employees had been employed less than 2 weeks.

Based on instructions from the Hospital’s security department, which had experience with the prior withdrawal of recognition of its union, Smith delivered the petition to Russo during his shift at about 3:30 p.m. on October 25, 2018. She congratulated him, shook his hand and thanked him shook his hand, thanked and congratulated him. Russo also told him that she knew “it wasn’t easy to do” and concluded the discussion by telling Smith that she needed to get the petition to human resources.<sup>84</sup>

## 2. The Hospital Withdraws Recognition

On October 24, 2018, Evans informed Schmid that the disaffection petition was going to be delivered to management on October 25, 2018. Schmid, who is based at UHS in Pennsylvania, and Bernstein, who is based out in Florida, traveled to the Hospital the next day in order to await the disaffection petition. Shortly after receiving it, Russo handed it off to Schmid. Within

<sup>72</sup> Smith was not a very credible witness and, as such, I do not credit his testimony that “everybody wanted to sign” the petition. Many of his responses were vague, evasive and non-responsive. He assumed the leadership role in circulating the petition but was extremely vague and lacked recollection about the circumstances by which he allegedly received the blank petition from an unnamed kitchen employee. Smith’s motivation for opposing the Union was simply unclear. He expressed strong sentiment about the Union’s positions in bargaining but professed ignorance of the Union’s wage proposals. I find that highly unlikely. (Tr. 398–419.)

<sup>73</sup> Cooper was also not a credible witness. He provided vague testimony about being unable to get ahold of the Union and his displeasure with his wage rate. Like Smith, he provided ambiguous and contradictory explanations as to who started the petition, who collected which signatures, including the signatures after October 12, 2018. (Tr. 374–376, 383, 387, 390–391, 395–397.)

<sup>74</sup> Claros’ equivocation when asked to explain the circumstances when she signed the petition indicated that she felt pressured as a new employee to sign it: I - - really I don’t read, because when they just sign this and the Union, I say I don’t want it. . . . (Tr. 312–314, 318–323.)

<sup>75</sup> Barnes did not credibly explain why he signed the petition after testifying that he no problem with the Union. He also professed ignorance when shown specific bargaining briefs but conceded that similar documents were mailed to his home. (Tr. 280–281, 288–290.)

<sup>76</sup> Ard had returned to work at the Hospital in October 2016 and was told by the Union that he would get a pay raise after 90 days but was not aware that the CBA had expired. (Tr. 467–468, 476–477.)

<sup>77</sup> Benti was displeased with the Union’s response to a disciplinary matter but conceded that she was primarily concerned with the fact that the raises had stopped as a result of bargaining. (Tr. 447–557.)

<sup>78</sup> Otchere testified that she signed the disaffection petition because the Union did not answer her questions, but it was clear that her frustration was attributable to the Union inability to procure a pay raise (Tr. 345, 359–360.)

<sup>79</sup> Reyes testified that he signed because he felt that his department did not need a union. However, when asked for further explanation he testified that he felt that the Union did not do anything because he had not had a raise for 2 years. (Tr. 331–341.)

<sup>80</sup> Bellamy did not attend any of the bargaining sessions but was given the impression from others that the Union’s wages were less than the amounts in the expired CBA. (Tr. 366–371.)

<sup>81</sup> Collins testified that she did not want to pay union dues but, in fact, she was not paying dues at the time that she signed the petition. (Tr. 298–299, 304–305.) Moreover, she conceded on cross-examination that she actually signed the petition because she was frustrated over the Union’s inability to get the Hospital to agree to a new contract and a pay increase. (Tr. 310–311.)

<sup>82</sup> Schmid’s vague recollection that she only learned of the petition from EVS assistant director Rhonda Evans sometime around “July, August, September” of 2018 was not credible based on her December 11, 2016 email and her recollection of other salient facts. (Tr. 224, 228–230; GC Exh. 36.)

<sup>83</sup> R. Exh. 7.

<sup>84</sup> Although Smith was on the clock, he had received supervisory permission to take the petition to Russo’s office, where he had to “wait a while” before meeting with Russo. (Tr. 414, 422–423.)



the next several hours, Schmid, with the assistance of supervisors and human resource staff, validated or dismissed all of the signatures on the petition based on a review of personnel and payroll records. The Hospital determined that 156 employees were members of the bargaining unit as of that date and that the disaffection petition had been signed by 81 of them.<sup>85</sup>

By email during the morning of October 26, the Hospital withdrew its recognition of the Union as the exclusive collective-bargaining representative of the bargaining unit and revoked its access rights. The Union replied that it was still willing and able to bargain on the previously scheduled dates of October 31 and November 1, 2018. The Hospital rejected the Union's overture almost immediately and since that time refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit on the grounds that the Union no longer enjoyed the support of a majority of members in the bargaining unit.<sup>86</sup>

#### *E. Unilateral Changes*

Following its withdrawal of recognition from the Union, on November 1, 2018 the Hospital unilaterally implemented the following changes, including wage rates, compensation structure and transit benefits of EVS and dietary employees:

##### **Welcome EVS and Dietary Teams!**

We are delighted to welcome you to the GW Hospital team of non-union employees.

We are proud to have you as part of our dedicated team here at GW Hospital. Each of you contributes greatly to the care of our patients, employees and visitors every single day. The vital role that you play is so important to our hospital. We are looking forward to working with you directly and supporting you in your development and growth.

##### **FIRST, WE WANT TO GIVE YOU AN UPDATE ABOUT THE ROLLOUT OF THE NEW PAY RATES AND BENEFITS YOU WILL NOW HAVE AS A NON-UNION EMPLOYEE:**

##### **Monthly Commuter Subsidy**

This benefit is added onto your paycheck. Previously the union did not negotiate this benefit on your behalf so you did not receive it. Moving forward, you will receive this benefit as follows, **starting with the pay period beginning November 11, 2018:**

**Full-time: \$100 per month**

**Part-time: \$50 per month**

##### **Employee Engagement Activities**

We are thrilled to also have you join our other non-union employees in the following activities:

- **Coffee with Kim** – Kim will be scheduling special EVS/Dietary only coffees in the next few weeks; then, going forward, all other GW employees in the regularly scheduled Coffees with Kim.

##### • **Staff Rounding.**

• **New hire Check-In Interviews** with supervisors after 30 and 60 days. **Stay Interview** with your supervisor at 6 months and annually. These provide additional opportunity to talk about what is going well, your career goals, and any concerns you may have.

have. out w at Is going well, your career goals, and any concerns you may have.

• Opportunity to serve on **Hospital employee committees.**

• **Participation in action planning for GW Hospital engagement surveys.**

##### **Pay**

• In the next few weeks, we will be transitioning you to **market-based pay rates** (which take into account your years of experience) for your job classifications. **Many of you will see significant increases, and everyone will receive at least a 3% increase in their pay.**

• Additionally, in July, all former bargaining unit members will also be eligible for an **additional increase – a merit based pay increase** determined by your performance evaluation.

• We will also implement a **lump sum bonus program** in 2019 for all former bargaining unit employees in each department contingent on departmental scores.

##### **Benefits**

We will be transitioning everyone to our non-union benefit programs including PTO, Holidays and Leave Banks. We will share more information regarding these programs in the coming weeks.<sup>87</sup>

The memorandum went on to “clear up a few rumors,” asserting that the withdrawal of recognition was not illegal and referred to the October 26 letter to the Union. In addition, the Hospital said the Union put out a flyer that the Union's assertion that the Hospital engaged in bad faith bargaining and would be contesting that charge before the Board. The Hospital reiterated that there is no “union contract still in place” and concluded with the following advisory: “If you don't want the union spending some other poor union person's dues fighting your rightful and legal decision to become non-union, you have every right to tell it so. **If the union really cares about what you think and want, as it says it does, it should respect your decision.**” (emphasis in original)

As predicted in the memorandum, EVS and dietary department employees received wage increases in November or December 2018. The Hospital implemented the changes unilaterally and without affording the Union an opportunity to bargain over them at any time after the withdrawal of recognition on October 26, 2018.

#### *F. The Hospital's Attorneys Meet with Prospective Witnesses*

Prior to the hearing, the Hospital's attorneys, Tammie Rattray and Paul Beshears, accompanied by Schmid, arranged to meet

<sup>85</sup> The General Counsel notes that the Hospital neither struck probationary employees from the petition nor determined whether each signatory was part of the unit at the time they signed the petition. (Tr. 229–236, 510, 517, 521–523, 526; R. Exh. 8–10.) It does not argue, however,

that any of the signatories should have been excluded from those counted as unit employees.

<sup>86</sup> GC Exh. 28.

<sup>87</sup> GC Exh. 29.

with unit employees who signed the disaffection petition.<sup>88</sup> All were instructed by managers or supervisors to leave their work areas to meet with counsel in a Hospital administration office.

Once they arrived to meet with the attorneys, either Rattray or Beshears explained the purpose of the interviews as preparation for testimony in this proceeding, and explained that their participation was voluntary and they were free to refrain from any or all of the interview without recrimination. Their explanations to four of those employees—William Barnes,<sup>89</sup> Angelica Claros, Noel Reyes<sup>90</sup> and Vivian Otchere<sup>91</sup>—was followed up by reading or explaining the following printed statement to them, and then having each employee sign, print their names and date the form on June 6:

#### JOHNNIE'S POULTRY STATEMENT<sup>92</sup>

1. I have given this statement at the request of [Tammie Rattray or Paul Beshears], who introduced [herself or himself] as an attorney who represents George Washington University Hospital ("GWUH") with regard to labor matters.

2. [Ms. Rattray or Mr. Beshears] informed me [she or he] is conducting an investigation in order to help GWUH to determine how to respond to an unfair labor practice case and that [she or he] would like to ask questions in order to obtain factual information which may be relevant to these issues.

3. [Ms. Rattray or Mr. Beshears] informed me my participation in this interview is entirely voluntary and that at any time I can decide that I do not want to participate in the interview. In that case, I would be free to stop speaking with [her or him].

4. [Ms. Rattray or Mr. Beshears] informed me that absolutely no action will be taken against me if I decline to be interviewed or if I decline to answer a particular question or any questions at all.

5. [Ms. Rattray or Mr. Beshears] informed me I will not in any way be disadvantaged or rewarded by GWUH based on whether my answer to any question is consistent or inconsistent with GWUH's position.

I have read the above statement and I understand it. I have not been told anything which contradicts what is stated above.<sup>93</sup>

#### Legal Analysis

#### I. THE HOSPITAL'S ALLEGED FAILURE OR REFUSAL TO BARGAIN IN GOOD FAITH

##### A. The Surface Bargaining Allegations

The General Counsel alleges that the Hospital engaged in

surface bargaining by: (1) proposing and adhering to contract terms that would have left unit employees with fewer rights than they would have in the absence of a collective-bargaining agreement; (2) its unlawful combination of proposals—no arbitration and no work stoppages; (3) its unlawful combination of proposals—unfettered wage discretion, broad management rights, no arbitration, and no just cause for discipline; (4) engaging in regressive bargaining when it withdrew a proposal providing for arbitration of grievances based on employee discharges; and (5) failing to establish legitimate justifications for its insistence on drastic changes to contract language over which the parties previously had little to no dispute.

The Hospital denies the surface bargaining allegations and contends that it bargained in good faith and with the intention of reaching a contract. It avers that (1) there is no evidence that it maintained and adhered to initial proposals that were never countered by the Union; (2) a mistake is not regressive bargaining; (3) it was entitled to negotiate union security and its initial proposal was not unlawful; and (4) its initial wage proposal did not grant it unfettered discretion.

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees." In relevant part, Section 8(d) of the Act defines the phrase "to bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to *meet at reasonable times* and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." (emphasis added). The Board recently reiterated this statutory mandate in *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 5 (2018), citing *J. H. Rutter-Rex Manufacturing Co., Inc.*, 86 NLRB 470, 506 (1949):

[t]he obligation to bargain collectively surely encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring. Agreement is stifled at its source if opportunity is not accorded for discussion or so delayed as to invite or prolong unrest or suspicion. It is not unreasonable to expect of a party to collective bargaining that he display a degree of diligence and promptness in arranging for collective bargaining sessions when they are requested, and in the elimination of obstacles thereto, comparable to that which he would display in his other business affairs of importance.

against when the attorneys questioned him prior to the hearing. (Tr. 335–336.) However, he was presented with the written form by one of the attorneys and signed it. Based on my observation of his testimony, I find that Reyes was articulate and likely understood the contents of the statement that he signed. (Tr. 342–343; R. Exh. 13.)

<sup>91</sup> Otchere's conflicting testimony indicated that she signed the document after speaking with counsel for ten to fifteen minutes about the petition. Again, I credit the testimony of counsel that Otchere, like the other witnesses, were provided with the requisite assurances. (Tr. 351–364; R. Exh. 14.)

<sup>92</sup> *Johnnie's Poultry*, 146 NLRB 770 (1964) (Board established conditions under which an employer may interrogate an employee about Section 7 matters).

<sup>93</sup> R. Exh. 11–14.

<sup>88</sup> Rattray and Beshears credibly explained the circumstances of their interviews with the witnesses, provided assurances as to the voluntary nature of their cooperation, and discussed and read each of the forms before having them sign them. (Tr. 485–488.)

<sup>89</sup> The General Counsel argues that Barnes' initial testimony—that he was not given the requisite assurances at the outset of the interview—stands in contrast with his signed statement. However, I credited the testimony of Rattray and Beshears that they provided the assurances at the beginning of each encounter and, in Barnes' case, he did testify on redirect when presented with the signed statement that he was given certain assurances. (Tr. 282–283, 294–295; R. Exh. 11.)

<sup>90</sup> Reyes also testified that he was not given any assurances that he would not be retaliated

On March 29, 2017, the Hospital tendered no-strike and grievance and mediation proposals, along with a management rights proposal substantially identical to its December 6, 2016 proposal. The Hospital contends, however, that it never indicated that any of its proposals were its “last and final offer” and that it eventually withdrew its no-strike proposal. It also cites the Union’s 18-month delay in responding to the Hospital’s grievance and mediation proposal and failure to respond to its no-strike/no-lockout proposal. With respect to the Union’s grievance and mediation counterproposal on September 5, 2018, the Hospital notes that it was copied from another hospital group’s agreement and bore no resemblance to the expired CBA.

The Hospital essentially concedes the unlawfulness of its March 29, 2017 no-strike proposal, which it repeatedly attempted to tie-in with a non-binding mediation clause in lieu of arbitration. However, it asserts that it eventually withdrew the proposal over 14 months later on June 7, 2018.<sup>94</sup> The Hospital’s initial January 17, 2017 disciplinary proposal unlawfully sought to eliminate the just cause requirement and proposed to exclude arbitration for all discipline except for discharge. See *Kitsap Tenant Support Services, Inc.*, 366 NLRB at 9 (employer’s unlawful proposals included the unfettered right to administer discipline and discharge).

The Hospital’s December 6, 2016 management rights proposal, which hardly budged over nearly 2 years of bargaining, unlawfully combined with its wage proposals to give it unfettered discretion to change virtually all aspects of bargaining unit operations, including wages, benefits, hiring, promotion and transfer, disciplinary action without just cause, job classifications, work schedules, supervisors performing unit work, the use of part-time, per diem, agency and temporary employees, and work rules. See *Kitsap Tenant Support Services, Inc.*, supra at 8 (bad faith proposal would have given employer the exclusive rights to determine wages, benefits, discipline, promotion, demotion, discipline, layoff, discharge, rules and regulations and operational functions, and an ineffective grievance procedure); *McClatchy Newspapers*, 321 NLRB 1386, 1391 (1996) (proposal to give employer unrestricted control over wages constituted bad faith bargaining); *Woodland Clinic*, 331 NLRB 735, 740 (2000) (same).

The Hospital notes that the Union took a long time in countering many of its proposals. However, the failure of the parties to move forward in an efficient manner is also attributable to the Union’s resistance to the aforementioned bad faith proposals by the Hospital, which precipitated a seemingly perpetual humdrum of counterproposals that merely nicked along the surface. The Hospital also alludes to Godoff’s offensive language during several bargaining sessions, but as the Board noted in *Victoria Packing Corp.*:

There can be no doubt that [the Union’s representative] is a confrontational person, and that he approached the negotiations without the diplomacy of a foreign ambassador. However, no one expects labor negotiations to be conducted in the sitting room of the Harvard Club by persons having a gracious, gentle manner. ‘For better or worse, the obligation to bargain

also imposes the obligation to thicken one’s skin and to carry on even in the face of what otherwise would be rude and unacceptable behavior.’

332 NLRB 597, 600 (2000). See also *Success Village*, 347 NLRB 1065, 1081(2006) (employer improperly declared impasse during contentious negotiations based on the union’s reference to employer’s representative as an “asshole”); *Long Island Jewish Medical Center*, 296 NLRB 51, 71–72 (1989) (same).

The Hospital’s prolonged adherence to no-strike, grievance and mediation, and management rights proposals, along with its unrestricted, ambiguous and unpredictable merit or market-based wage proposals, constituted bad faith surface bargaining in violation of Section 8(a)(5) and (1) of the Act. See *Regency Service Carts, Inc.*, 345 NLRB 671, 675 (2005) (unlawful employer bargaining proposals included management rights clause granting it unfettered discretion over workplace rules, discipline and wages, a broad no-strike clause, and excluded arbitration to any challenges to employer’s application of management rights); *A-1 King Size Sandwiches*, 265 NLRB 850 (1982) enf’d 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1034 (1984) (unlawful proposals included unfettered discretion over merit increases, scheduling and hours, layoff, recall, granting and denying leave, promotions, demotions, discipline, assignment of work outside the unit and changes to past practices, a broad no-strike clause, and exclusion of disciplinary decisions from the grievance-arbitration procedure).

In making and adhering to such a combination of proposals, the Hospital unlawfully endeavored to strip the Union of its role in representing bargaining unit employees in violation of Section 8(a)(5) and (1) of the Act. See *Target Rock*, 324 NLRB 373, 386–387 (1997) enf’d. 172 F.3d 921 (D.C. Cir 1998) (simultaneous proposal and maintenance of no-strike provision, broad management rights clause, and ineffective grievance and arbitration procedure found unlawful); *Public Service of Oklahoma*, 334 NLRB 487, 488–489 (2001) (employer engaged in bad faith bargaining when it “insisted on unilateral control to change virtually all significant terms and conditions of employment of unit employees during the life of the contract”).

Moreover, the Hospital unlawfully insisted on eliminating the parties’ longstanding union-security, basing its position on philosophical grounds—i.e., the belief that its employees should have the freedom of choice as to whether or not to join the Union and pay dues—without laying out a legitimate business justification. Schmid testified that the Hospital was impeded in its employee recruitment efforts due to its relationship with the Union, but that allegation was not substantiated. Under the circumstances, the Hospital’s insistence on eliminating the union security clause violated Section 8(a)(5) and (1). See *Kalthia Group Hotels, Inc.*, 366 NLRB No. 118 (2018) (employer unlawfully refused to consider any union-security provision on philosophical grounds and without advancing any legitimate business justification).

Finally, on April 5, 2017, the Hospital unlawfully regressed from its January 17, 2017 discipline proposal by tendering a

<sup>94</sup> R. Exh. 3 at 175–176.

grievance-mediation proposal that still undermined the effectiveness of the arbitration process. The Union noted the discrepancy and, on May 16, 2017, the Hospital conceded that its April 5 proposal conflicted with its January 17 proposal. Bernstein informed the Union that the Hospital would reconcile the proposals but never did and, on May 25, 2017, informed the Union that arbitration was out of the equation. See *Management & Training Corporation*, 366 NLRB No. 134, slip op. at 4 (2018) (regressive proposals are unlawful when “made in bad faith or are intended to frustrate agreement”); *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001) (unexplained, dubious regressive proposal suggests bad-faith bargaining).

### B. The Bargaining Briefs

“[A]n employer’s free speech right to communicate [its] views to [its] employees is firmly established, and cannot be infringed by a union or the Board. Thus, [Section 8(c) of the Act] merely implements the First Amendment by requiring that the expression of “any views, argument, or opinion” shall not be ‘evidence of an unfair labor practice,’ so long as such expression contains “no threat of reprisal or force or promise of benefit” in violation of § 8(a)(1).” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). That right also extends to non-coercive communication between an employer and its employees in the context of the collective-bargaining process. *United Technologies Corp.*, 274 NLRB 609, 610 (1985) (as the Board has recognized, “permitting the fullest freedom of expression by each party” nurtures a “healthy and stable bargaining process.” It is not for the Board to “police or censor propaganda.”) *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 60 (1966); see also *Long Island College Hosp.*, 327 NLRB 944, 947 (1999) (over-enthusiastic rhetoric is protected speech unless it is knowingly false or made with reckless disregard for the truth).

As previously mentioned, the bargaining briefs continually disparaged the Union during bargaining, misrepresented the parties’ bargaining positions, including its wage proposals, and blamed the Union for the lack of a pay raise. Taken in context with the Hospital’s unlawful surface bargaining tactics over a 2-year period, the bargaining briefs served to undercut unit employees’ support for the Union. See *Regency House of Wallingford, Inc.*, 356 NLRB 563, 567 (2011) (in the context of additional unlawful conduct, denigration of union conveyed implicit threat that union representation would be futile and employees would have to rely on employer to protect their interests); *General Electric*, 150 NLRB 192 (1964) (bargaining briefs compounded the effects of employer’s bad-faith conduct during bargaining and at the table and, predictably, fueled employees’ dissatisfaction with the union). See *Miller Waste Mills, Inc.*, 334 NLRB 466, 467 (2001) (Board upheld finding that employees became alienated from the union due to belief that it prevented a wage increase).

Although the bargaining briefs were the vehicles by which the effects of the Hospital’s unlawful conduct was conveyed to unit employees, they did not convey any objective “threat of reprisal or force or promise of benefit.” See *Children’s Center*, 347

NLRB 35, 36 (2006) (employer “lawfully expressed an unfavorable opinion about the union, its positions, and its actions.”); *NLRB v. Pratt & Whitney Air Craft Div., United Techs. Corp.*, 789 F.2d 121, 135 (2d Cir. 1986) (employer lawfully asserted that the union was on “a collision course,” their preparation was “thoughtless and irresponsible,” and that their offers were “unrealistic”); *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985) (employer lawfully issued bulletins criticizing the Union’s demands and tactics and setting forth its version of the negotiations).

### II. THE HOSPITAL’S WITHDRAWAL OF RECOGNITION

Pursuant to Section 8(a)(5) of the Act, an employer has a continuing obligation to recognize and bargain with an incumbent union. Upon expiration of a collective-bargaining agreement, an incumbent union is presumed to enjoy majority support among unit employees, and an employer may withdraw recognition only on the basis of objective evidence showing that the union has actually lost majority support. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001) (withdrawal of recognition lawful if employer proves that at the time of withdrawal the union was not supported by a majority of unit employees). The obligation to recognize and bargain with a union ends, however, if the union no longer enjoys majority support. *Id.* at 720.

As of October 25, 2018, the Hospital’s employee roster listed 151 bargaining unit employees on the payroll. On that date, the Hospital was presented with a union disaffection petition containing 81 valid signatures of bargaining unit employees obtained between March 16 and October 25, 2018—a majority of the bargaining unit.<sup>95</sup> The General Counsel contends, however, that the Hospital’s surface and regressive bargaining, accompanied by the bargaining briefs, warrants a presumption that such conduct tainted the disaffection petition on which the Hospital based its withdrawal of recognition. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996), *affd. in part*, 117 F.3d 1454 (D.C. Cir. 1997) (a causal relationship is presumed between unremedied bargaining violation and a subsequent showing of disaffection).

The Hospital argues that the *Lee Lumber* presumption does not apply because that case involved a general refusal to both recognize and bargain with the incumbent union. Instead, the Hospital relies on *Levitz Furniture Co.*, *Id.* at 725, to support its contention that its withdrawal of recognition was lawful because it submitted a disaffection petition signed by 53.6 percent of bargaining unit employees. Notwithstanding its disavowal of *Lee Lumber*, the Hospital relies on that decision for the proposition that “[n]ot every unfair labor practice will taint evidence of a union’s subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support.” *Lee Lumber*, 322 NLRB at 177. Finally, the Hospital contends that analysis of the facts reveals that they fall short of the standard set forth in *Master Slack*, 271 NLRB 78, 84 (1984) for establishing a tainted petition:

<sup>95</sup> The General Counsel does not dispute the authenticity of the 81 signatures or the inclusion of those witnesses on list.

(1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

Regardless as to whether one applies *Lee Lumber* or *Master Slack*,<sup>96</sup> both decisions require proof of a causal connection between the petition and the Hospital's bad faith surface and regressive bargaining, compounded by its dissemination of bargaining briefs to employees lampooning the Union's frustrations and resistance to its unlawful conduct. Analyzing the case under the *Lee Lumber*, the Hospital's unlawful failure to bargain in good faith with the Union is presumed to have caused the subsequent employee disaffection. From the unit employees' viewpoint, the Hospital's surface and regressive bargaining, compounded by the bargaining briefs, clearly discredited the Union, conveyed a sense of futility in union representation and prompted many unit employees to sign the disaffection petition.

Analysis of the case under *Master Slack* produces the same result. The timing of the unfair labor practices was clearly connected to the withdrawal of recognition. The signature collection began in March 2018, after 16 months of bargaining, most of it precipitated by the Hospital's bad faith bargaining. A total of 81 eligible unit employees signed the disaffection petition. Thirty of those employees signed the petition between during the period that the Hospital adhered to its unlawful no-strike proposal (March 29 to June 7, 2018). The most striking development is that, while 54, or two-thirds, of those employees signed during the period from March to early October 2018, the remaining one-third—27 employees—signed the petition during the 2 weeks following the Hospital's issuance of the October 12 bargaining brief blaming the Union for blocking pay raises and leading up to the delivery of the petition to Russo on October 25, 2018.

The timing of those signatures strongly suggests a causal connection. See, e.g., *Gene's Bus Co.*, 357 NLRB 1009 (2011) (approximately seven months passed between manager's public denigration of and physical assault on the shop steward, and five to 6 months passed between direct-dealing incidents and the circulation of the decertification petition); *Bunting Bearings Corp.*, 349 NLRB 1070 (2007) (month-long lockout ended just eight days before the employees executed the May 29 petition and fifteen days before the employer withdrew recognition); *AT Systems West*, 341 NLRB 57, 60 (2004) (nine months between unlawful direct dealing and circulation of decertification petition); *RTP Co.*, 334 NLRB 466, 468 (2001) (finding "close temporal proximity" between the employer's unfair labor practices and its withdrawal of recognition where the unfair labor practices

occurred 2 to 6 weeks prior to the antiunion petition on which the employer based its withdrawal of recognition).

The evidence establishes that the Hospital's conduct meets the other *Master Slack* factors as well. The Hospital consistently adhered to a consistent course of surface and regressive bargaining that prolonged bargaining and it followed those actions with bargaining briefs blaming the Union for the delays. After 16 months of protracted bargaining and no raise on the horizon, employees understandably became disillusioned with the Union. Twenty-six employees expressed their disaffection with the Union after the Hospital misrepresented on October 12, 2018 that the Union's wage proposal was inimical to their interests and they would be better off without union representation. See *Miller Waste Mills, Inc.*, 334 NLRB 466, 468–469 (2001) (employees became alienated from Union after employer misrepresented union's bargaining positions and blamed it for preventing employees from receiving their customary annual wage increase); *Detroit Edison*, 310 NLRB 564, 566 (1993) (employer's unfair labor practices "convey[ed] to employees the notion that they would receive more . . . without union representation. Such conduct improperly affects [the] bargaining relationship").

The last factor in a *Master Slack* analysis is whether the Hospital's surface and regressive bargaining had lasting effects on unit employees. The representative sample of employee sentiment produced by the Hospital demonstrated that most of those who signed the petition were displeased with the Union for failing to secure a new contract and wage increases during a lengthy period of bargaining. Two of the witnesses organized the disaffection effort and were clearly antiunion. Of the remaining eight employees, however, six conceded that the Union's inability to obtain pay raises from the Hospital for 2 years was a significant reason as to why they signed the disaffection petition.<sup>97</sup> First, the Hospital delayed in producing a wage proposal until May 2018. When it finally produced one, it tendered an unprecedented, radically different compensation system that spurred further rancor at the bargaining table. Its wage proposal was doomed on arrival. The proposal, which was presented as nonnegotiable, gave the Hospital unfettered discretion to set wage rates within a series of ambiguous ranges. Its October 12, 2018 misleading bargaining brief impugning the Union for hampering the issuance of pay raises triggered a stampede of disappointed unit employees to sign the petition over the course of the next 2 weeks. See *Mesker Door, Inc.*, 357 NLRB 591, 598 (2011) (unlawful statement that Board charges "would result in lost wage increases and lower bonus amounts" was so close in time to a flurry of petition signatures that it "appear[ed] to have directly affected employees' support for the Union").

Under the circumstances, the Hospital's October 26, 2018 withdrawal of recognition from the Union as the labor representative for unit employees violated Section 8(a)(5) and (1). In

<sup>96</sup> The General Counsel objected to the admission of subjective testimony regarding employee disaffection on the ground that analysis under the *Master Slack* test assesses only the likelihood that causation exists. See *SFO Good-Nite Inn*, 357 NLRB 79, 82–83 and fn. 26 (2011) (subjective employee testimony regarding their Union disaffection excluded due to "the inherent unreliability of such testimony"). However, the Board recently left the door open on this issue in *Denton County*, 366 NLRB No. 103, slip op. at 3, fn. 10 (2018) (judge did not abuse his

discretion in permitting the testimony of four employees who signed the disaffection petition). Moreover, the Board's administrative law judges, as expert fact finders in these labor relations disputes, are quite capable of assessing the reliability of subjective testimony in conjunction with the objective evidence.

<sup>97</sup> Mary Collins, Noel Reyes, Vivian Otchere, Lewis Bellamy, Tsedale Benti, and Freddie Ard.

addition, the circumstances also require that the ensuing remedy include a bargaining order ordering the Hospital to bargain with the Union for a reasonable period of time and at least twice per week. See *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 399 fn. 7 (2001). These circumstances include the Hospital's prolonged and unlawful failure and refusal to bargain in good faith with the Union, the widespread disaffection caused by the Hospital's surface and regressive bargaining, as well as the compounding effect of those actions through bargaining briefs, and the fact that the Hospital has already proceeded unilaterally to change unit employees' terms and conditions of employment. Those changes adversely impacted unit employees' Section 7 rights as evidenced by the Hospital's newly acquired and unfettered discretion to determine their wages and the evisceration of critical due process rights that they had under the expired CBA relating to the disciplinary and grievance/arbitration processes.

### III. THE NOVEMBER 1, 2018 MEMORANDUM

On November 1, 2018, the Hospital notified unit employees that it was unilaterally changing their terms and conditions of employment since they were now nonunion employees. The changes included a transition to market-based wage structure, lump sum bonuses, PTO, holiday and leave banks, and a monthly commuter subsidy. With respect to the transit benefit, the Hospital noted that "[t]his benefit is added to your paycheck. Previously the union did not negotiate this benefit on your behalf so you did not receive it."

Given that its withdrawal of recognition of the Union was unlawful, the parties were still in a bargaining relationship governed by the Act. Accordingly, the aforementioned unilateral changes, undertaken after rejecting the Union's offer to resume bargaining, also constituted an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act. See *Southern Bakeries, LLC*, 364 NLRB 804 (2016); *Narricort Industries, L.P.*, 353 NLRB 775, 776 fn. 11 (2009); *Northwest Graphics, Inc.*, 342 NLRB 1288, 1288 (2004); *Turtle Bay Resorts*, 353 NLRB 1242, 1275 (2009). I disagree, however, with the General Counsel's contention that the Hospital's statement that the Union failed to negotiate a transit benefit on their behalf constituted either a separate coercive act under Section 8(a)(1) or a separate bargaining violation under Section 8(a)(5). See *Litton Systems*, 300 NLRB 324, 330 (1990), *enfd.*, 949 F.2d 249 (8th Cir. 1991), *cert denied*, 503 U.S. 985 (1992) (the Board is "reluctant to find bad-faith bargaining exclusively on the basis of a party's misconduct away from the bargaining table").

### IV. THE HOSPITAL'S WITNESS INTERVIEWS

In preparation for the hearing, the Hospital's attorneys met separately with unit employees in an office to discuss giving their providing testimony at the hearing. At the hearing, the General Counsel moved to strike certain witness testimony on the ground that, during trial preparation, the Hospital's attorneys interviewed employees without first advising them of their rights under *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964). The General Counsel also moves to and amend the complaint to add an allegation that those interviews amounted to coercive interrogation in violation of Section 8(a)(1) of the Act; that motion is granted and the allegations are deemed denied by the Hospital.

The Hospital opposes both motions on the grounds that its attorneys advised the witnesses of their rights to cooperate with counsel during the hearing preparation and to choose whether or not to testify at the hearing. The Hospital also contends that the proposed amendment should not be allowed because no charge was filed raising these allegations, nor are they closely related to any of the multiple charges filed in this case. Moreover, if the amendment is allowed, it should nonetheless be dismissed as the credible record evidence demonstrates the Hospital did not violate Section 8(a)(1) by interviewing employees.

The Hospital's contention that the charge is barred as untimely pursuant to Section 10(b) or otherwise unrelated to timely filed charges overlooks the fact that the issue did not accrue until a few weeks before the hearing when the witnesses were interviewed by trial counsel. Timeliness is not the issue, but rather, the judge's decision of whether to permit an amendment at the hearing. Section 102.17 of the Board's Rules authorizes the judge to grant complaint amendments "upon such terms as may be deemed just" during or after the hearing until the case has been transferred to the Board. See *Folsom Ready Mix, Inc.*, 338 NLRB 1172 fn. 1 (2003). In this case, the issue of employee interrogation did not come to light until the Hospital's witnesses testified at the hearing a few weeks later and were cross-examined by the General Counsel. Under the circumstances, there is no basis to deny the General Counsel's motion to amend the complaint to add allegations relating to coercive interrogation. See *Pincus Elevator & Electric Co.*, 308 NLRB 684, 684–685 (1992), *enfd. mem.* 998 F.2d 1004 (3d Cir. 1993) (judge abused her discretion by denying motion during the hearing to add a *Johnnie's Poultry* allegation, as respondent's counsel introduced the subject employee statement at trial, the allegation was fully litigated, and the respondent had therefore suffered no prejudice).

In *Johnnie's Poultry Co.*, the Board held that to safeguard against the possible coercion that may occur when employees are questioned about matters involving their Section 7 rights,

the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

Three of the employees interviewed—Barnes, Otchere and Reyes—provided conflicting testimony that they were either not advised about all of their rights under *Johnnie's Poultry* or received such advice after the interviews began. However, based on the credible evidence of the Hospital's experienced labor attorneys, Tammie Rattray and Paul Beshears, I found, in accordance with their custom and practice, that they read all of the witnesses their rights under *Johnnie's Poultry* from the preprinted forms and/or had them read and sign the forms further advising them of those rights at the outset of those interviews. Furthermore, the forms contained the requisite information—the purpose of the questioning, assured that no reprisal will take place

and obtained the employee's voluntary participation.

Under the circumstances, I find that the credible evidence establishes that the Hospital's attorneys provided the requisite assurances under *Johnnie's Poultry*. Accordingly, the General Counsel's motion to strike the testimony of witnesses called by the Hospital is denied and that allegation is dismissed.

#### CONCLUSIONS OF LAW

1. District Hospital Partners, L.P. d/b/a The George Washington University Hospital, a Limited Partnership, and UHS of D.C., Inc., General Partner (the Hospital) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a healthcare institution within the meaning of Section 2(14) of the Act.

2. 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region A/W Service Employees International Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All regular full-time and regular part-time employees of the [Hospital] in the Environmental Services, Linen Services, Ambulatory Care Center and Food Services Department of George Washington University Hospital.

4. The Hospital has violated Section 8(a)(5) and (1) of the Act by bargaining in bad faith during negotiations with no intention of reaching a successor collective-bargaining agreement by:

(a) Adhering to bargaining proposals that provide the Unit with fewer rights than afforded to them without a collective-bargaining agreement, such as a restrictive grievance-arbitration procedure that does not include binding arbitration, a no strike provision, and an expansive management's right clause.

(b) Engaging in regressive bargaining such as by proposing that discharges be subject to the grievance-arbitration procedure, and then later proposing a grievance procedure that culminates in non-binding mediation.

(c) Maintaining and adhering to bargaining proposals that delete a longstanding union security provision.

(d) Maintaining and adhering to bargaining proposals that give Respondent unfettered discretion in employee wages.

(e) Unlawfully withdrawing recognition from the Union on October 26, 2018 after committing unfair labor practices that are likely to cause loss of union support among employees.

5. The Hospital further violated Section 8(a)(5) and (1) by: (a) refusing to bargain with the Union as the exclusive collective bargaining representative of employees in the aforementioned bargaining unit on or after October 26, 2018, and (b) unilaterally implementing changes to employees' terms and conditions of employment and refusing to bargain over such changes on November 1, 2018.

6. The Hospital's unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### REMEDY

Having found that the Hospital has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom. Under the circumstances, however, a cease-and-desist order alone

would be inadequate to remedy the Hospital's withdrawal of recognition. Accordingly, the Hospital shall be ordered to take certain affirmative action designed to effectuate the policies of the Act, including the issuance of an affirmative bargaining order. An affirmative bargaining order is appropriate in these circumstances due to the Hospital's prolonged and unlawful failure and refusal to bargain in good faith with the Union, the extensive disaffection caused by the Hospital's surface and regressive bargaining, the compounding of the effect of those actions through bargaining briefs, and the Hospital's unilaterally change to unit employees' terms and conditions of employment. *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Caterair International*, 322 NLRB 64, 68 (1996). Those changes adversely impacted unit employees' Section 7 rights as evidenced by the Hospital's newly acquired and unfettered discretion to determine unit employees' wages and the evisceration of due process provided under the expired CBA relating to the disciplinary and grievance/arbitration processes.

Having found that the Hospital violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union, the Hospital shall be ordered to meet at reasonable times and in good faith with the Union as the exclusive bargaining representative of its employees in the above described bargaining unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, to embody the understanding in a written agreement. Due to the Hospital counsel's refusal to meet more than twice per month during the bad-faith bargaining period, a bargaining schedule requiring the Hospital to meet and bargain with the Union on a regular and timely basis is appropriate and would effectuate the purposes of the Act. See *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn. 2 (2011) (ordering employer to comply with a bargaining schedule to remedy its unlawful conduct), *enfd.* 540 Fed. Appx. 484 (6th Cir. 2013). Upon the Union's request, the Hospital shall be required to bargain for a minimum of 15 hours per week, or in the alternative in accordance with some other schedule to which the Union agrees. The Hospital shall also be required to submit written bargaining progress reports every 15 days to the compliance officer for Region 5, and to serve copies of those reports on the Union.

Finally, given the nature of the violations, the prolonged period of bad faith bargaining, and the previous practice between the parties, the Hospital shall be ordered to make the following employee negotiators whole for any earnings and/or leave lost while attending bargaining sessions: Cynthia Bey, Pamela Brooks, Aisha Brown, Marcia Hayes, Sonya Stevens and Arlene Smith. *Frontier Hotel & Casino*, 318 NLRB 857, 857 (1995) (employees reimbursed for expenses incurred during bargaining where employer engaged in "egregious and deliberate surface bargaining"). I decline, however, to issue such an order with respect to the costs of the Union representatives in attending two bargaining sessions per month.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>98</sup>

#### ORDER

The Respondent, District Hospital Partners, L.P. d/b/a The George Washington University Hospital, a Limited Partnership, and UHS of D.C., Inc., General Partner, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the Union as the certified exclusive collective-bargaining representative of employees in the following appropriate unit:

All regular full-time and regular part-time employees of the [Hospital] in the Environmental Services, Linen Services, Ambulatory Care Center and Food Services Department of George Washington University Hospital.

(b) Engaging in the following surface, regressive and bad-faith bargaining with the Union for a successor collective-bargaining agreement:

(1) Adhering to bargaining proposals that provide the unit with fewer rights than afforded to them without a collective-bargaining agreement, such as a restrictive grievance-arbitration procedure that does not include binding arbitration, a no strike provision, and an expansive management's right clause.

(2) Engaging in regressive bargaining such as by proposing that discharges be subject to the grievance-arbitration procedure, and then later proposing a grievance procedure that culminates in non-binding mediation.

(3) Maintaining and adhering to bargaining proposals that delete a longstanding union security provision.

(4) Maintaining and adhering to bargaining proposals that give Respondent unfettered discretion in employee wages.

(5) Unlawfully withdrawing recognition from the Union on October 26, 2018 after committing unfair labor practices that are likely to cause loss of union support among employees.

(c) Unilaterally implementing changes to employees' terms and conditions of employment without giving the Union an opportunity to bargain over such changes in good faith.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize, and upon request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All regular full-time and regular part-time employees of the [Hospital] in the Environmental Services, Linen Services,

Ambulatory Care Center and Food Services Department of George Washington University Hospital.

(b) Upon the Union's request, bargain for a minimum of 15 hours per week, or in the alternative in accordance with some other schedule to which the Union agrees.

(c) On the Union's request, rescind any or all of the unilaterally implemented changes made in the terms and conditions of employment of employees since November 1, 2018.

(d) Within 14 days from the Board's Order, make Cynthia Bey, Pamela Brooks, Aisha Brown, Marcia Hayes, Sonya Stevens and Arlene Smith whole for any loss of earnings and other benefits incurred during bargaining.

(e) Within 14 days from the Board's Order, compensate employees in the Unit, with interest, for any loss of earnings and other benefits resulting from the unilateral changes we have made to their wages, hours, and working conditions since October 26, 2018.

(f) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix"<sup>99</sup> in all places where notices to employees are customarily posted, including but not limited to the following locations at The George Washington University Hospital located at 900 23rd St N.W., Washington, D.C. 20037: the bulletin boards located in the Linen Services Department, the office of the Environmental Services department, and the kitchen located outside of the cafeteria in the Food Services department. The notices shall be posted by the Respondent and maintained for 60 consecutive days. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posted on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Submit written bargaining progress reports every 15 days to the compliance officer for Region 5 and serve copies of those reports on the Union.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

<sup>98</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>99</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region, a/w Service Employees International Union (the Union), is the employees' representative in dealing with us regarding wages, hours, and other working conditions of our employees in the following appropriate unit (the Unit):

All regular full-time and regular part-time employees of the Employer in the Environmental Services, Linen Services, Ambulatory Care Center and Food Services Departments of George Washington University Hospital

WE WILL NOT fail or refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.

WE WILL NOT, during negotiations with the Union for a successor contract, simultaneously maintain and adhere to bargaining proposals that provide the Unit with fewer rights than afforded to them without a collective-bargaining agreement, such as a restrictive grievance-arbitration procedure that does not include binding arbitration, a no strike provision, and an expansive management's right clause.

WE WILL NOT, during negotiations with the Union for a successor contract, simultaneously maintain and adhere to bargaining proposals that delete a longstanding union security provision.

WE WILL NOT, during negotiations with the Union for a successor contract, simultaneously maintain and adhere to bargaining proposals that give us unfettered discretion in your wages.

WE WILL NOT, during negotiations with the Union for a successor contract, engage in regressive bargaining, such as by proposing that discharges be subject to the grievance-arbitration procedure, and then later proposing a grievance procedure that culminates in nonbinding mediation.

WE WILL NOT withdraw recognition from the Union or refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

WE WILL NOT fail or refuse to continue negotiations for a successor contract with the Union as the exclusive collective-bargaining representative of the Unit.

WE WILL NOT unilaterally make changes to the terms and conditions of employment of employees in the Unit without first

giving notice to the Union and affording the Union an opportunity to bargain collectively with respect to such changes.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as your representative concerning wages, hours and working conditions. If an agreement is reached with the Union, we will sign a document containing that agreement.

WE WILL give the Union notice and an opportunity to bargain over any proposed changes to the wages, hours, and working conditions of employees in the Unit before putting such changes into effect.

WE WILL identify and, on the Union's request, rescind any changes that we have made unilaterally since November 1, 2018 to the wages, hours, and working conditions of employees in the Unit.

WE WILL compensate employees in the Unit, with interest, for any loss of earnings and other benefits resulting from the unilateral changes we have made to their wages, hours, and working conditions since October 26, 2018.

WE WILL pay the following employee bargaining committee members for any pay and/or leave they lost attending bargaining sessions: Cynthia Bey; Pamela Brooks; Aisha Brown; Marcia Hayes; Sonya Stevens; and Arlene Smith.

WE WILL file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, a report allocating the backpay award to the appropriate calendar year(s).

DISTRICT HOSPITAL PARTNERS, L.P. D/B/A THE GEORGE WASHINGTON UNIVERSITY HOSPITAL, A LIMITED PARTNERSHIP, AND UHS OF D.C., INC., GENERAL PARTNER

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/05-CA-216482](http://www.nlrb.gov/case/05-CA-216482) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

